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NOTES

Timeliness of Petitions for Judicial Review Under Section 106(a) of the Immigration and Nationality Act

Section 106(a) of the Immigration and Nationality Act (INA)¹ provides for exclusive review² of “all final orders of deportation” in the United States Courts of Appeals.³ In passing this legislation, Congress sought to “create a single, separate, statutory form of judicial review”⁴ of deportation orders. This form of review was designed to eliminate the bringing of repeated, meritless appeals by aliens⁵ while at the same time ensuring the fairness of judicial review procedures.⁶ With the aim of expediting judicial review,⁷ Congress provided in section 106(a)(1) that “a petition for review may be filed not later than six months from the date of the final deportation order.”⁸

Section 106(a), however, does not define the phrase “final deportation order” and, during the early history of the statute, courts differed on its correct interpretation in a variety of contexts.⁹ In *Foti v. Immigration and Naturalization Service*,¹⁰ the Supreme Court resolved some of these issues, adopting a generous reading of the statute. The Court

1. 8 U.S.C. § 1105a(a) (1982). This Note will generally refer to the section numbers of the INA, rather than to the United States Code numbers. For a conversion chart matching the sections of the INA to sections of Title 8 of the United States Code, see T.A. ALEINIKOFF & D. MARTIN, *IMMIGRATION: PROCESS AND POLICY* lxxxi-lxxxii (1985).

2. For a discussion of exceptions to the exclusivity of judicial review of deportation orders in the courts of appeals, see note 25 *infra*.

3. 8 U.S.C. § 1105a(a) (1982).

4. H.R. REP. NO. 1086, 87th Cong., 1st Sess. 22 (1961); see also Part III.B.3 *infra*.

5. H.R. REP. NO. 1086, 87th Cong., 1st Sess. 22-23 (1961); see also Parts III.B.3 & III.B.4 *infra*.

6. H.R. REP. NO. 1086, 87th Cong., 1st Sess. 28-33 (1961); see also Part III.B.5 *infra*.

7. See, e.g., Letter from Deputy Attorney General Byron R. White to Rep. Emanuel Celler (Apr. 18, 1961), reprinted in H.R. REP. NO. 1086, 87th Cong., 1st Sess. 24-25 (1961) (“[I]n order to speed up the judicial review, the special statutory review proceeding . . . must be instituted not later than 6 months from the date of the final order of deportation.”).

8. 8 U.S.C. § 1105a(a)(1) (1982).

9. Compare *Fong v. INS*, 308 F.2d 191 (9th Cir. 1962) (courts of appeals have jurisdiction to review denials of requests for suspension of deportation made during deportation proceedings), with *Foti v. INS*, 308 F.2d 779 (2d Cir. 1962) (contra), *revd.*, 375 U.S. 217 (1963), *Holz v. INS*, 309 F.2d 452 (9th Cir. 1962) (courts of appeals do not have jurisdiction to review denials of requests for withholding of deportation), and *Zupicich v. Esperdy*, 207 F. Supp. 574 (S.D.N.Y. 1962) (same). See also *Blagaic v. Flagg*, 304 F.2d 623 (7th Cir. 1962) (courts of appeals have jurisdiction to review decisions of regional commissioners); *Roumeliotis v. INS*, 304 F.2d 453 (7th Cir.) (same), *cert. denied*, 371 U.S. 921 (1962); 2 C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 8.9Ab, at 8-84 to -94.3 (1987); Note, *Judicial Review of Final Orders of Deportation*, 42 N.Y.U. L. REV. 1155 (1967); Note, *Jurisdiction to Review Prior Orders and Underlying Statutes in Deportation Appeals*, 65 VA. L. REV. 403 (1979); Part I.B.1 *infra*.

10. 375 U.S. 217 (1963).

held that "final orders of deportation" include not only determinations of deportability but also "all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals."¹¹ The Court later ruled¹² that the denial of a motion to reopen a deportation proceeding is reviewable by the courts of appeals under section 106(a).¹³ The denial of a motion to reconsider a deportation order is

11. 375 U.S. at 229. The court mentioned, as examples of such ancillary orders, "orders denying voluntary departure pursuant to § 244(e) and orders denying the withholding of deportation under § 243(h)." 375 U.S. at 229. For other examples of ancillary orders reviewable under § 106(a), see 2 C. GORDON & H. ROSENFELD, *supra* note 9, § 8.9Ab, at 8-86 to -87. Generally, orders that do not come within the courts of appeals' jurisdiction under § 106 are reviewable in federal district court. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 (1968); *Salehi v. District Director, INS*, 796 F.2d 1286, 1291 (10th Cir. 1986). See generally 2 C. GORDON & H. ROSENFELD, *supra* note 9, §§ 8.5, 8.8; 8 *id.* § 63.02.

The Board of Immigration Appeals (BIA) is a quasi-judicial body with exclusively appellate functions. It is completely separate from the Immigration and Naturalization Service (INS), although BIA decisions are binding on all INS officers unless modified or overruled by the Attorney General. 1 C. GORDON & H. ROSENFELD, *supra* note 9, § 1.10b, at 1-71 to -72. In 1983, the Attorney General established the Executive Office for Immigration Review, which is headed by a Director and supervised by the Associate Attorney General. The Director is responsible for the general supervision of the BIA and the Chief Immigration Judge. *Id.*, § 1.9A. The Chief Immigration Judge supervises the immigration judges (formerly known as "special inquiry officers"). Immigration judges conduct exclusion and deportation hearings (also referred to as deportation proceedings or § 242(b) proceedings) and carry out other duties assigned to them by the Attorney General. 8 C.F.R. § 3.10 (1987); 1 C. GORDON & H. ROSENFELD, *supra* note 9, § 1.10Aa, at 1-88.20 to -88.21. See generally Rewald, *Judicial Control of Administrative Discretion in the Expulsion and Extradition of Aliens*, 34 AM. J. COMP. L. 451, 456-57 (Supp. 1986).

12. *Giova v. Rosenberg*, 379 U.S. 18 (1964) (per curiam). For a discussion of two later Supreme Court decisions on the scope of § 106(a) jurisdiction, see Part I.B.3 and note 38 *infra*.

13. The Supreme Court recently stated that "[t]here are at least three independent grounds on which the BIA may deny a motion to reopen." *INS v. Abudu*, 108 S. Ct. 904, 911 (1988). First, it may hold that the movant has not established a prima facie case for the underlying relief sought. The Court has not decided what standard of judicial review applies when the BIA rests its denial of a motion to reopen on this ground. 108 S. Ct. at 911. Second, the BIA may hold that the movant has not met the requirement of 8 C.F.R. § 3.2 that previously unavailable, material evidence be introduced. 108 S. Ct. at 911; see also note 29 *infra*. Or, where the movant requests reopening to apply for asylum, the BIA may hold that he has not "reasonably explain[ed] the failure to request asylum prior to the completion of the . . . deportation proceeding." 8 C.F.R. § 208.11 (1987); see also 108 S. Ct. at 911. In *Abudu*, the Court held that "the appropriate standard of review of such denials is abuse of discretion." 108 S. Ct. at 912. In discussing a third ground of denial, the Court stated that

in cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, but not withholding of deportation), the BIA may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief. We have consistently held that denials of this third ground are subject to an abuse-of-discretion standard.

108 S. Ct. at 912; see also *INS v. Rios-Pineda*, 471 U.S. 444, 451 (1985) (BIA did not abuse discretion in denying reopening based on aliens' flagrant violation of the immigration laws). See generally 65 INTERPRETER RELEASES 220-24 (1988) (digesting *Abudu*). Although in *Abudu* the Court did not address review of denials of motions to reopen on the third ground where the grant of the underlying relief requested is not discretionary, it appears that an abuse-of-discretion standard would also apply in such a case, the reason being that 8 C.F.R. § 3.2 has been interpreted to give the BIA discretion in granting or denying motions to reopen. See 108 S. Ct. at 912 & n.10; see also *Sangabi v. INS*, 763 F.2d 374, 375 (9th Cir. 1985).

similarly reviewable.¹⁴ The reviewability of these later orders creates a situation where there may be two or more reviewable orders with respect to a single alien.¹⁵ This has led the courts of appeals to disagree on the proper application of the six-month time limit on filing a petition for judicial review.

The Ninth Circuit held in *Bregman v. INS*¹⁶ that if a motion to reopen a deportation proceeding is filed within six months of the final deportation order, and the petition for judicial review is filed within six months of the denial of the motion to reopen, the court has jurisdiction to review *both* the final deportation order and the denial of the motion. This allows the court to review the final deportation order even though the petition for review was filed more than six months after entry of that order. The same rule applies to motions to reconsider.¹⁷ The Eighth¹⁸ and First Circuits¹⁹ have also adopted this approach.

The Third Circuit, by contrast, held in *Nocon v. INS*²⁰ that a court of appeals may not review a final deportation order unless the petition for review is filed within six months of the specific order for which review is sought. The Fifth and Seventh Circuits appear to follow this approach, although they have not yet been presented with facts similar to those in *Bregman*.²¹

The District of Columbia and Second Circuits have announced their intention to steer a middle ground. In *Attoh v. INS*,²² the D.C. Circuit stated that "the *Bregman* rule might well be troubling in a case where there have been repeated and arguably frivolous motions to re-

14. See, e.g., *Chudshevid v. INS*, 641 F.2d 780, 784 (9th Cir. 1981) (denial of motion to reconsider is reviewable on abuse-of-discretion standard); see also *Cheng Fan Kwok v. INS*, 392 U.S. 206, 213 (1968) (implying reviewability of motions to reconsider under § 106(a)). In *ICC v. Brotherhood of Locomotive Engrs.*, 107 S. Ct. 2360 (1987), the Supreme Court held that, "where a party petitions an agency for reconsideration on the ground of 'material error,' i.e., on the same record that was before the agency when it rendered its original decision, 'an order which merely denies rehearing of . . . [the prior] order is not itself reviewable.'" 107 S. Ct. at 2366 (quoting *Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 387 n.7 (1974)). This holding greatly restricts the reviewability of motions to reconsider.

15. Cf. *Foti v. INS*, 308 F.2d 779, 785 (2d Cir. 1962) ("Are there then two 'final orders,' and when do the six months of § 106(a)(1) start to run?"), *revd.*, 375 U.S. 217 (1963).

16. 351 F.2d 401 (9th Cir. 1965).

17. E.g., *Hyun Joon Chung v. INS*, 720 F.2d 1471, 1474 (9th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984).

18. See *Aiyadurai v. INS*, 683 F.2d 1195, 1199 (8th Cir. 1982); *Bae v. INS*, 706 F.2d 866, 869 n.5 (8th Cir. 1983); see also *Shyllon v. INS*, 728 F.2d 1087 (8th Cir. 1984).

19. See *Fuentes v. INS*, 746 F.2d 94, 97 (1st Cir. 1984). The Fourth Circuit has suggested that it might follow the Ninth Circuit approach, although it has not been presented with the issue. See *Sung Ja Oum v. INS*, 613 F.2d 51, 53 n.2 (4th Cir. 1980).

20. 789 F.2d 1028 (3d Cir. 1986) (declining to follow *Bregman*).

21. See *Te Kuei Liu v. INS*, 645 F.2d 279, 282 (5th Cir. 1981) ("A petition for review must be filed within six months of the date of the entry of the order to be reviewed."); *Chul Hi Kim v. INS*, 357 F.2d 904, 906 (7th Cir. 1966).

22. 606 F.2d 1273 (D.C. Cir. 1979).

open or reconsider.”²³ Thus the court adopted *Bregman* “only insofar as it implicitly recognizes that intervening *good faith petitions* for administrative relief may toll or suspend the running of the time limit.”²⁴

This Note argues that courts should adopt a “good faith approach” to the section 106 timeliness issue. This approach would be similar to that suggested by the District of Columbia and Second Circuits. Part I discusses the statute, the relevant regulations, and the history of Supreme Court interpretation of section 106. Part II reviews the various approaches to the timeliness question developed by the courts of appeals. Part III argues that although the statutory language and legislative history are ambiguous on the section 106(a) timeliness question, the good faith approach would best achieve the goals of section 106: judicial economy, discouraging dilatory tactics, and fairness to the alien. Part III also argues that the good faith approach is in keeping with past Supreme Court interpretation of section 106, judicial interpretation of similar timeliness questions with respect to review of orders of other administrative agencies, and the Supreme Court’s approach to frivolous appeals by aliens.

I. THE STATUTE, THE REGULATIONS, AND THE SUPREME COURT’S APPROACH TO SECTION 106(A)

A. *The Statutory and Regulatory Framework*

1. *The Structure of Section 106*

Section 106 provides for review by the courts of appeals as “the sole and exclusive procedure” for judicial review of all “final orders of

23. 606 F.2d at 1276 n.15.

24. 606 F.2d at 1276 n.15 (emphasis added). The Second Circuit, in *Fu Chen Hsiung v. INS*, No. 79-4012 (2d Cir. May 15, 1979) (LEXIS, Genfed library, USApp file), stated its general agreement with the *Bregman* rule but held that “on the facts of this case, where there have been three applications [to the BIA for discretionary review] . . . , we hold that it is not appropriate to consider the merits of the deportation orders at this late hour.”

In *Woodby v. INS*, 370 F.2d 989 (6th Cir. 1965), *revd.*, 385 U.S. 276 (1966), *Woodby* sought review of both a deportation order and the denial of a motion to reconsider. The INS contended that since the petition for review was filed more than six months after the date of the deportation order, the court was limited to reviewing the denial of the motion to reconsider. The court of appeals declined to decide this question, concluding that the deportation order should be affirmed on other grounds. The Supreme Court subsequently granted certiorari to consider what burden of proof the government must sustain in deportation proceedings. *Woodby v. INS*, 385 U.S. 276, 277 (1966). In its brief, the INS stated that “in light of” *Bregman*, which the Ninth Circuit had decided subsequent to the decision of the court of appeals in *Woodby*, it was abandoning its contention that the court of appeals had not had jurisdiction to review the deportation order. See Brief for Respondent at 8 n.3, *Woodby v. INS*, 385 U.S. 276 (1966) (No. 40). In its decision, the Supreme Court did not resolve the timeliness issue, noting that “[i]n light of the *Bregman* decision, the Government before this Court expressly abandoned its contention that in this case the courts are limited to reviewing the denial of the motion to reconsider.” 385 U.S. at 287 n.20. Justice Clark, in the course of a dissent joined by Justice Harlan, argued that the Court should have resolved the timeliness issue and that the *Bregman* rule “would negate the congressional purpose behind the insistence on timely filing in § 106(a)(1).” 385 U.S. at 291.

deportation.”²⁵ Section 106(a)(1) provides that “a petition for review may be filed not later than six months from the date of the final deportation order.”²⁶ Further, section 106(c) provides that “[a]n order of deportation . . . shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right . . .

25. INA § 106(a), 8 U.S.C. § 1105a(a) (1982) provides:

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title [section 242(b) of the original Act]

The provisions adopted, with certain modifications, were those of the Hobbs Administrative Orders Review Act (originally referred to in the statute as “the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.),” 8 U.S.C. § 1105a note (1982) (Codification)), currently codified at 28 U.S.C. §§ 2341-2353 (1982), providing for judicial review of orders of certain other federal administrative agencies, such as the Federal Communications Commission, the Federal Maritime Board, and the Atomic Energy Commission. *See* H.R. REP. NO. 1086, 87th Cong., 1st Sess. 27 (1961), *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2950, 2970-71; *see also* ICC v. Brotherhood of Locomotive Engrs., 107 S. Ct. 2360, 2365 (1987); Part III.C.2 *infra*.

There are certain exceptions to the exclusivity of judicial review of deportation orders by petition to the courts of appeals. Section 106(a)(9) provides that “any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.” *See* H.R. REP. NO. 565, 87th Cong., 1st Sess. 15-16 (1961); H.R. REP. NO. 1086, 87th Cong., 1st Sess. 29-30, *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2950, 2973-74. *See generally* Williams v. INS, 795 F.2d 738, 743-45 (9th Cir. 1986) (discussing the scope of habeas jurisdiction under § 106(a)(9)); Salehi v. District Director, INS, 796 F.2d 1286, 1289-90 (10th Cir. 1986) (same). An alien need not be in actual physical custody in order to bring a habeas corpus action. Courts have found restraint sufficient to support habeas jurisdiction when an alien has been released on bond or is subject to an order of supervision. 2 C. GORDON & H. ROSENFELD, *supra* note 9, § 8.6b, at 8-36. Whether the mere entering of a final deportation order against an alien who is not in custody or on bond or parole constitutes restraint sufficient to support habeas corpus appears to be in doubt. *See id.* § 8.6b, at 8-37 n.11 and cases cited therein; *see also id.* § 8.9Ab, at 8-81.

Under § 106(a)(5), an alien who claims to be a United States national and presents a genuine issue of material fact will have his case transferred to a United States District Court for a hearing de novo on his nationality. *See* Agosto v. INS, 436 U.S. 748, 753-54 (1978). Under § 106(a)(6), the validity of a deportation order may also be challenged in a criminal proceeding brought against an alien under § 242(d) or (e) of the INA (relating to prosecution of aliens who willfully fail to depart from the United States after having been ordered deported, or who willfully violate the terms of supervision imposed following the entry of an order of deportation). *See Hearings on H.R. 187 and S. 2212 Before the Subcomm. on Immigration and Naturalization of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. 11-13 (1961) (available from Congressional Information Service) [hereinafter *Senate Hearings*] (testimony of David Carliner, representing the Association of Immigration and Nationality Lawyers) (describing methods of judicial review permitted under the proposed legislation); 2 C. GORDON & H. ROSENFELD, *supra* note 9, § 8.9Ab, at 8-78 to -81 (1986). Section 106 does not explicitly address the availability of collateral attack on the validity of a deportation order in a criminal proceeding under 8 U.S.C. § 1326 (1982), which provides that an alien who has been deported and thereafter enters the United States without the consent of the Attorney General is guilty of a felony. However, the Supreme Court recently reversed a conviction under § 1326, *United States v. Mendoza-Lopez*, 107 S. Ct. 2148, 2155 (1987), holding that “a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review” because of violations of procedural due process.

26. 8 U.S.C. § 1105a(a)(1) (1982). A judicial appeal is in the form of a petition for review and there is an automatic stay of deportation upon service of the petition on the INS, “unless the court otherwise directs.” *See* INA § 106(a)(3), 8 U.S.C. § 1105a(a)(3) (1982).

or if he has departed from the United States after the issuance of the order.”²⁷ This exhaustion requirement means that the alien must appeal the deportation order to the Board of Immigration Appeals (BIA) before filing a petition for judicial review.²⁸

2. *Motions To Reopen or Reconsider*

The BIA may reopen or reconsider, either on its own motion or on the motion of the affected alien, any case in which it has rendered a decision.²⁹ A motion to reopen and a motion to reconsider are two

27. INA § 106(c), 8 U.S.C. § 1105a(c) (1982) provides:

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

The courts have generally held that “departure,” as used in the provision of § 106(c) which provides that “[a]n order of deportation . . . shall not be reviewed by any court if the alien . . . has departed from the United States after the issuance of the order,” refers either to voluntary departure by the alien or “legally executed” departure when effected by the government. *See Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977) (“‘departure’ in the context of [§ 106(c)] cannot mean ‘departure in contravention of procedural due process’”); *Zepeda-Melendez v. INS*, 741 F.2d 285, 287 (9th Cir. 1984); *United States v. Calderon-Medina*, 591 F.2d 529, 530 (9th Cir. 1979); *Thorsteinsson v. INS*, 724 F.2d 1365, 1367 (9th Cir.), *cert. denied*, 467 U.S. 1205 (1984); *Juarez v. INS*, 732 F.2d 58, 59-60 (6th Cir. 1984); *cf. United States v. Mendoza-Lopez*, 107 S. Ct. 2148, 2154 & n.13 (1987) (noting *Mendez* but expressing no view as to its validity); *Matter of Yih-Hsiung Wang*, 17 I. & N. Dec. 565 (BIA 1980) (alien who left the country during period of voluntary departure granted by immigration judge could not thereafter successfully bring a motion to reopen; distinguishing *Mendez*). *But cf. Umanzor v. Lambert*, 782 F.2d 1299, 1303 (5th Cir. 1986) (expressing “serious reservations regarding the ‘Mendez exception,’” since “if the exception is taken to its logical conclusion, any error or procedural defect at any point in the alien’s deportation saga . . . would render the departure illegal”).

The statute also limits venue to the judicial circuit where the administrative proceedings were conducted or where the alien resides. INA § 106(a)(2), 8 U.S.C. § 1105a(a)(2) (1982). This provision was designed to prevent aliens from forum shopping for courts with crowded calendars. H.R. REP. NO. 1086, 87th Cong., 1st Sess. 28-29 (1961). Section 106(a)(4) provides that the Attorney General’s findings of fact, if supported by “reasonable, substantial and probative evidence,” are conclusive. 8 U.S.C. § 1105a(a)(4) (1982). *See generally Woodby v. INS*, 385 U.S. 276 (1966); *Foti v. INS*, 375 U.S. 217, 228-29 & n.15 (1963); 2 C. GORDON & H. ROSENFELD, *supra* note 9, § 8.9Ah, at 8-94.16 to -94.17.

28. *E.g., Bak v. INS*, 682 F.2d 441 (3d Cir. 1982). However, if review is sought only of the denial of a motion to reopen, failure to take an administrative appeal from the deportation order does not bar a petition for review of the denial of the motion. The petitioner would, of course, first have to appeal to the Board from the denial of his motion in order to meet the exhaustion requirement. *E.g., Toon-Ming Wong v. INS*, 363 F.2d 234, 235 (9th Cir. 1966); *Ibrahim v. United States INS*, 821 F.2d 1547, 1549 (11th Cir. 1987). The finality of a final order of deportation is not affected by the possibility that the alien may be eligible for discretionary relief, for which no application has been submitted. *INS v. Chadha*, 462 U.S. 919, 936-37 (1983); 2 C. GORDON & H. ROSENFELD, *supra* note 9, § 8.9Ab, at 8-89.

29. The INA does not provide for motions to reopen or reconsider and the right to make such motions depends entirely on the administrative regulations. 1 C. GORDON & H. ROSEN-

separate and distinct motions with different requirements, although they are discussed together in the regulations.³⁰ A motion to reopen must be based upon new material evidence that was not available and could not have been discovered or presented by the alien at the prior hearing.³¹ A motion to reconsider must "state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent,"³² and requires no allegations of new facts.³³ There is

FIELD, *supra* note 9, § 1.10g, at 1-88.6 (Supp. Dec. 1987). 8 C.F.R. § 3.2 (1987) provides, in pertinent part:

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

30. See 8 C.F.R. § 3.2 (1987); *see also* note 29 *supra*. 8 C.F.R. § 3.8 (1987) provides, in pertinent part:

(a) *Form.* . . . Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent. In any case in which a deportation order is in effect, there shall be included in the motion to reopen or reconsider such order a statement by or on behalf of the moving party declaring whether the subject of the deportation order is also the subject of any pending criminal proceeding under section 242(e) of the Act, and, if so, the current status of that proceeding. If the motion to reopen or reconsider is for the purpose of seeking discretionary relief, there shall be included in the motion a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution. Motions to reopen or reconsider shall state whether the validity of the deportation order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case.

(d) *Ruling on motion.* Rulings upon motions to reopen or motions to reconsider shall be by written order. If the order directs a reopening, the record shall be returned to the officer of the Service having administrative jurisdiction over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.

Other pertinent regulations are 8 C.F.R. §§ 103.5 and 242.22 (1987), concerning motions to reopen before immigration judges and other adjudicators. In most cases, motions to reopen are directed to the administrative authority that last made a decision in the case. 1 C. GORDON & H. ROSENFELD, *supra* note 9, § 1.10g, at 1-88.14. *See generally* Hurwitz, *Motions Practice Before the Board of Immigration Appeals*, 20 SAN DIEGO L. REV. 79 (1982); 1 C. GORDON & H. ROSENFELD, *supra* note 9, § 1.10g; 1A *id.* § 5.13a.

31. 8 C.F.R. § 3.2 (1987); *see also* note 29 *supra*.

32. 8 C.F.R. § 3.8(a) (1987); *see also* note 30 *supra*.

no time limit specified in the regulations for making either type of motion except that neither may be brought after the departure of the person involved from the United States.³⁴

The regulations also provide that "[m]otions to reopen or reconsider shall state whether the validity of the deportation order has been or is the subject of any judicial proceeding."³⁵ The filing of a motion to reopen or reconsider does not automatically stay the execution of any decision made in the case, although a stay may be granted by the BIA or the Immigration and Naturalization Service (INS) officer having administrative jurisdiction over the case.³⁶

B. Supreme Court Interpretation of Section 106(a) Jurisdiction

The Supreme Court has decided questions of the reach of the jurisdiction of the courts of appeals under section 106(a) in four major cases.³⁷ Three of these decisions are helpful in approaching the timeli-

33. See Hurwitz, *supra* note 30, at 90 ("The motion to reconsider is a request that the Board reexamine its decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked, while the motion to reopen is usually based upon new evidence or a change in factual circumstances.") (footnotes omitted). Successful motions to reconsider usually involve a change in law or interpretation of law. *Id.* at 90 n.75.

34. *E.g.*, Matter of Estrada, 17 I. & N. Dec. 187 (BIA 1979); see also 8 C.F.R. § 3.2 (1987); note 29 *supra*; 1 C. GORDON & H. ROSENFELD, *supra* note 9, § 1.10g, at 1-88.13 to -88.14. However, the Ninth Circuit has held that a motion to reopen may be brought after the alien has been deported if the deportation was not "legally executed." *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981); see also note 27 *supra* (discussing the "Mendez exception"); note 149 *infra* and accompanying text.

35. 8 C.F.R. § 3.8(a) (1987); see also note 30 *supra*.

36. 8 C.F.R. § 3.8(a) (1987); see also note 30 *supra*. It is becoming increasingly important to obtain a stay pending consideration by the BIA of a motion, as the INS recently amended its regulations to facilitate prompt execution of final deportation orders. 63 INTERPRETER RELEASES 659 (1986). Amended 8 C.F.R. § 243.3 (1987) eliminates the 72-hour advance notice of the time and place of surrender for deportation of an alien not already in custody. 63 INTERPRETER RELEASES 538 (1986). The preamble to the regulation states:

Immigration and Naturalization Service statistics have indicated that a majority of aliens do not comply with the notice to surrender, which has been commonly and derisively referred to as a "run letter". . . .

. . . .
The purpose of the revision is to provide the Service with an effective tool to enforce final orders of deportation . . . in a timely manner. . . .

. . . [I]mplementation of the revised regulation will institute procedures whereby the Service will assume custody of the alien respondent at the time of issuance of a final order of deportation by the immigration judge, or appellate tribunal or court of last resort. Upon assumption of custody, the respondent will be held a minimum of 72 hours prior to removal by the Service, to ensure that due process is accorded the detainee.

51 Fed. Reg. 23,041 (1986), reprinted in 63 INTERPRETER RELEASES 549 (1986); see also note 93 *infra*; 51 Fed. Reg. 34,081 (1986) (amending 8 C.F.R. §§ 242.1, 242.2, 242.7 and 287.3 to expedite the processing of detained aliens in deportation proceedings), reprinted in 63 INTERPRETER RELEASES 848-49 (1986). Aliens are "not infrequently" deported after unsuccessfully attempting to obtain a stay of deportation pending adjudication of their motion to reopen or reconsider by the BIA. Telephone interview with Gerald S. Hurwitz, Counsel to Director, Executive Office for Immigration Review (Mar. 11, 1988).

37. *Foti v. INS*, 375 U.S. 217 (1963); *Giova v. Rosenberg*, 379 U.S. 18 (1964) (per curiam); *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968); *INS v. Chadha*, 462 U.S. 919 (1983); see generally *Dhangu v. INS*, 812 F.2d 455, 458-59 & n.5 (9th Cir. 1987).

ness question, although they do not address it directly.³⁸

1. Foti v. INS

Foti v. INS was the Court's first decision interpreting the scope of the jurisdiction of the courts of appeals under section 106(a). Francesco Foti had entered the country on a seaman's visa and stayed illegally for ten years.³⁹ At his deportation hearing, he conceded deportability, but applied for suspension of deportation under then section 244(a)(5) of the INA.⁴⁰ The immigration judge ruled that Foti did not qualify for suspension of deportation and the BIA upheld this decision.⁴¹ Foti then brought an action in federal district court for review of the BIA's decision. The district court dismissed the action on the ground that under section 106(a) jurisdiction to review such a determination lay with the appropriate court of appeals. Foti then sought review in the United States Court of Appeals for the Second Circuit.⁴² A divided Second Circuit, sitting *en banc*, dismissed the petition for lack of jurisdiction, holding that the term "final orders of

38. The fourth decision, *INS v. Chadha*, is important to any discussion of court of appeals jurisdiction under § 106(a), but is not directly relevant to the issues discussed in this Note.

Chadha's deportation order had been issued after the House of Representatives "vetoed" the suspension of his deportation, as it had the power to do under § 244(c)(2) of the INA. See 462 U.S. at 923-27. Chadha challenged the constitutionality of the legislative veto provision and, after exhausting his administrative remedies, brought a § 106(a) petition for review of the deportation order. The court of appeals held that it had jurisdiction to review the constitutionality of the legislative veto. *Chadha v. INS*, 634 F.2d 408, 411-15 (9th Cir. 1980). The Supreme Court affirmed, holding that "the term 'final orders' in § 106(a) 'includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing.'" 462 U.S. at 938 (quoting *Chadha v. INS*, 634 F.2d at 412). The Court distinguished *Cheng Fan Kwok* since the alien in that case "did not 'attack the deportation order itself but instead [sought] relief not inconsistent with it.'" 462 U.S. at 938 (quoting *Cheng Fan Kwok*, 392 U.S. at 213).

For a discussion of the impact of the *Chadha* decision on the scope of § 106(a) jurisdiction, see 2 C. GORDON & H. ROSENFELD, *supra* note 9, § 8.9Ab, at 8-94.2 to -94.3 & n.55h. For examples of decisions reading *Chadha* narrowly, see *Olaniyan v. District Director, INS*, 796 F.2d 373 (10th Cir. 1986); *Tooloe v. INS*, 722 F.2d 1434, 1437 (9th Cir. 1983). See also Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1311 n.116 (1986). Legomsky notes that even when the validity of the challenged order is a predicate for the ultimate deportation order, court decisions have tended to turn on whether an evidentiary hearing would be required. He goes on to explain that the Supreme Court's recent decision in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), deemphasizing the need for a further evidentiary hearing, may endanger the more restrictive holdings. Legomsky also discusses the difficulty of reconciling *Cheng Fan Kwok* and *Chadha*. Legomsky, *supra*, at 1365-66.

39. 375 U.S. at 217-18.

40. Immigration and Nationality Act, ch. 5, § 244(a)(5), 66 Stat. 163, 214-16 (1952) (current version at 8 U.S.C. § 1254(a)(2) (1982)). Section 244(a)(5) provided that the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who . . . is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien

41. 375 U.S. at 218-19.

42. 375 U.S. at 219.

deportation" in section 106(a) did not include discretionary orders withholding or suspending deportation.⁴³

In reversing the judgment of the court of appeals, the Supreme Court held that

all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure pursuant to § 244(e) and orders denying the withholding of deportation under § 243(h), are . . . included within the ambit of the exclusive jurisdiction of the Courts of Appeals under § 106(a).⁴⁴

The Court distinguished between the determination of deportability of an alien and the order directing his deportation. It reasoned that since 1940, when the Attorney General was given the power to grant discretionary relief under certain circumstances in deportation cases, administrative regulations had provided for determining deportability and ruling on applications for discretionary relief in a single proceeding before a special inquiry officer. When the alien was found deportable (or conceded deportability) and discretionary relief was denied, the hearing resulted in the issuance of a final deportation order. When discretionary relief was granted, no deportation order was issued, even if the alien was found to be deportable.⁴⁵

The Court concluded that Congress must have known of this administrative practice and had it in mind when it enacted section 106(a). It found persuasive a colloquy between Congressmen Walter, Lindsay, and Moore that occurred during the House debates on the predecessor to the bill containing section 106:

Representative Lindsay suggested that the legislative history should make absolutely clear "that if there is any remedy on the administrative level left of any nature, that the deportation order will not be considered final." Representative Walter agreed, and stated that "the final order means the final administrative order." With Representative Moore concurring, all three congressmen agreed that there would be no "final order of deportation" until after determination of the question of suspension. Significantly, Representative Walter, in discussing the running of the time period provided for the filing of petitions for review by the Courts of Appeals under the proposed legislation, stated that "the 6 months' period on the question of finality of an order applies to the final administrative adjudication of the applications for suspension of deportation just

43. The court of appeals based its decision on the finding that the phrase "final orders of deportation" had a "well-understood meaning," based on its usage in § 242 of the INA, the section governing the procedure for determining the deportability of an alien. 308 F.2d at 780-81. This meaning, the court found, was the "determination of deportability," as distinguished from discretionary determinations related to applications for relief from deportation. 308 F.2d at 781-82. The majority discounted arguments in the dissent based on administrative practice and legislative history, which were essentially adopted by the Supreme Court in its decision reversing the court of appeals. *See* 308 F.2d at 782-87.

44. 375 U.S. at 229.

45. 375 U.S. at 222-23; *see also* 375 U.S. at 228.

as it would apply to any other issue brought up in deportation proceedings."⁴⁶

In reaching the result in *Foti*, the Court took into account that "[t]he fundamental purpose behind § 106(a) was to abbreviate the process of judicial review . . . in order to frustrate certain practices . . . whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts."⁴⁷ The Court noted that the "key feature" of the congressional scheme directed at this problem was the elimination of the necessity for a suit in district court prior to obtaining review in the court of appeals. Since the Second Circuit's resolution of the jurisdictional issue would require the alien to seek review of the denial of discretionary relief in district court and review of the adjudication of deportability in a court of appeals, the congressional purpose to prevent bifurcation would be frustrated.⁴⁸ The Court also found that a more expansive reading of section 106(a) jurisdiction promoted good judicial policy, since "[r]eview of the denial of discretionary relief is ancillary to the deportability issue, and both determinations should therefore be made by the same court at the same time."⁴⁹

2. *Giova v. Rosenberg*

In *Foti*, the Court had left open the question whether section 106(a) extended the jurisdiction of the courts of appeals to include review of orders denying motions to reopen deportation proceedings.⁵⁰ In *Giova v. Rosenberg*,⁵¹ decided the following year, the Court answered this question in the affirmative.⁵² The Court issued the following one paragraph opinion, implying that it accepted the government's arguments⁵³ as to why denials of motions to reopen came within section 106(a):

46. 375 U.S. at 223-24 (quoting House debate at 105 CONG. REC. 12,728 (1959)); see also Part III.B.2 *infra*.

47. 375 U.S. at 224; see also Part III.B *infra*.

48. 375 U.S. at 225-27; cf. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (courts of appeals have jurisdiction to review Nuclear Regulatory Commission orders denying citizen petitions; contrary approach would result in bifurcation of review of orders issued in same proceeding). See generally L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 421-22 (1965); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 31-36 (1975); Legomsky, *supra* note 38.

49. 375 U.S. at 227; cf. notes 56 & 71-72 *infra* and accompanying text; Part III.C *infra*.

50. 375 U.S. at 231. The Court noted that "[t]he question is admittedly a somewhat different one, since such an administrative determination is not made during the same proceeding where deportability is determined and discretionary relief is denied." 375 U.S. at 231.

51. 379 U.S. 18 (1964) (per curiam).

52. The jurisdiction of the courts of appeals to review motions to reconsider has been narrowed by the Supreme Court's recent decision in *ICC v. Brotherhood of Locomotive Engrs.*, 107 S. Ct. 2360 (1987). See note 14 *supra*.

53. In its brief before the Ninth Circuit in *Giova v. Rosenberg*, 308 F.2d 347 (1962), the INS suggested that "this Court may lack jurisdiction under [§ 106(a)] to review and decide petitioner's appeal." Petitioner's Brief at 5, *Giova v. Rosenberg*, 379 U.S. 18 (1964) (No. 23). However, in its brief before the Supreme Court the INS argued that the court of appeals did have

Upon consideration of the submission of the United States that the judgment of the Court of Appeals should be reversed and the cause remanded with directions to entertain the petition for review, and upon examination of the entire record, the judgment is reversed and the case is remanded to the Court of Appeals with directions to entertain the petition for review.⁵⁴

The INS argued in *Giova* that although “[l]iterally, an order denying a motion to reopen . . . is not a ‘final order of deportation,’ ” since “[t]he order of deportation . . . was previously entered and permitted to become final,”⁵⁵ such an order should nonetheless come within the scope of section 106(a):

[T]he aim of [section 106(a)] — as its legislative history confirms . . . — was to provide a single, unitary review procedure, in an appropriate court of appeals, for every litigable issue that might arise in a deportation proceeding. The denial of a motion to reopen such a proceeding surely presents such an issue.

. . . .
 . . . [A] refusal to reopen . . . occurs subsequent to the final order of deportation. But . . . [t]he denial of a motion to reopen is made by the same officer who entered the final order of deportation — or, if the order was appealed, as here, to the Board of Immigration Appeals, then by that body, which, by its decision dismissing the appeal, in effect endorsed the deportation order and assumed responsibility for it — and is directly linked with the original proceedings out of which the deportation order arose. For these reasons it would be artificially literal, in the government’s view, to attempt to distinguish, for purposes of Section 106(a), between the final order proper and the denial of a motion to reopen the proceedings. In other words, an order declining to reopen the proceedings is so intimately and immediately associated with the principal order (the final order of deportation) that it would be pointless to require that the subsidiary directive be treated otherwise than as an adjunct of the principal order — comparable to the denial of a motion for rehearing or reconsideration. So considered, it should be reviewable, the government believes, in the same forum in which the principal order would be reviewable if review of the latter were sought.⁵⁶

jurisdiction. The petitioner (*Giova*), of course, also argued that the court had jurisdiction. *Id.* at 7.

54. 379 U.S. at 18.

55. Brief for Respondent at 15, *Giova* (No. 23) (emphasis in original); see also Brief for Respondent at 52, *Foti v. INS*, 375 U.S. 217 (1963) (No. 28).

56. Brief for Respondent at 15-18, *Giova* (No. 23) (footnote omitted); see also Brief for Respondent at 53-54, *Foti* (No. 28); *Cheng Fan Kwok v. INS*, 392 U.S. 206, 217 (1968) (“Petitions to reopen, like motions for rehearing or reconsideration, are, as the Immigration Service urged in *Foti*, ‘intimately and immediately associated’ with the final orders they seek to challenge.”) (quoting Brief for Respondent at 53, *Foti* (No. 28)); *INS v. Abudu*, 108 S. Ct. 904, 913 (1988) (comparing motions to reopen to petitions for rehearing and motions for new trials on the basis of newly discovered evidence); cf. Hurwitz, *supra* note 30, at 81 (“The motion to reopen is, at base, a request to alter an earlier decision.”).

The INS also argued in *Giova* that since “[a] refusal to reopen a deportation proceeding is . . . truly ancillary to the deportation order in which the proceedings culminated,” it would be “un-

This reasoning — that denials of motions to reopen or reconsider should be treated as adjuncts of the principal deportation order — was elaborated in the Court's 1968 decision in *Cheng Fan Kwok v. INS*.⁵⁷

3. Cheng Fan Kwok v. INS

Cheng Fan Kwok involved the issue of whether the courts of appeals had jurisdiction to review the denial of a stay of deportation sought from an INS district director after a final order of deportation had been issued. Both the petitioner and the INS urged the Court to hold that section 106(a) was applicable to "all determinations 'directly affecting the execution of the basic deportation order,' whether those determinations have been reached prior to, during, or subsequent to the deportation proceeding."⁵⁸

In holding that the courts of appeals did not have jurisdiction to review the denial of the stay, the Court distinguished *Foti* and *Giova* since, unlike the order in *Foti*, the denial of a stay by the district director was not entered in the course of a proceeding conducted by a special inquiry officer under section 242(b)⁵⁹ and, unlike the order in *Giova*, the denial of the stay was not a denial of an order to reopen such a proceeding.⁶⁰ The denial of a stay was issued in proceedings "entirely distinct from those conducted under § 242(b), by an officer other than the special inquiry officer who . . . presided over the deportation proceeding."⁶¹ The Court added that the application for a stay, unlike a motion to reopen, "did not 'attack the deportation order itself but instead [sought] relief not inconsistent with it.'"⁶²

desirable for the refusal to reopen such a proceeding to be reviewable in a district court while the deportation order was being reviewed in a court of appeals." Brief for Respondent at 19; *cf.* note 49 *supra* & notes 71-72 *infra* and accompanying text; Part III.C *infra*.

57. 392 U.S. 206 (1968).

58. 392 U.S. at 210 (quoting Brief for Respondent at 28). William H. Dempsey, Jr., who argued and filed a brief as amicus curiae by invitation of the Court, 392 U.S. at 210 n.9, argued, as the court of appeals had held, that § 106(a) encompassed only those orders made in the course of the § 242(b) deportation proceeding or denying motions to reopen or reconsider, *see* Brief for Amicus Curiae; 392 U.S. at 210.

59. 392 U.S. at 211. INA § 242(b) governs the conduct of deportation proceedings. *See generally* 1A C. GORDON & H. ROSENFELD, *supra* note 9, ch. 5; note 11 *supra*.

60. 392 U.S. at 211.

61. 392 U.S. at 213.

62. 392 U.S. at 213 (quoting *Mui v. Esperdy*, 371 F.2d 772, 777 (2d Cir. 1966)). The Court found further support for its holding in the colloquy on the floor of the House of Representatives, previously discussed in *Foti*, *see* note 46 *supra* and accompanying text, in which Congressman Walter stated that § 106(a) would apply to motions for discretionary relief made during the deportation hearing, "just as it would apply to any other issue brought up in deportation proceedings." 392 U.S. at 215 (quoting 105 CONG. REC. 12,728 (1959)) (emphasis added by the Supreme Court). The Court interpreted this statement to mean that "Congress quite deliberately restricted the application of § 106(a) to orders entered during proceedings conducted under § 242(b), or directly challenging deportation orders themselves." 392 U.S. at 215.

For a criticism of the result in *Cheng Fan Kwok* and a proposal for legislative reform, *see* Martin, Mandel, Cheng Fan Kwok, and Other Unappealing Cases: *The Next Frontier of Immigration Reform*, 27 VA. J. INTL. L. 803, 807-09 (1987).

The Court's discussion of the nature of final deportation orders in *Cheng Fan Kwok*, *Giova*, and *Foti*, along with the Court's references to congressional intent and sound judicial policy that support its discussion, provides a useful backdrop to consideration of the various approaches to the section 106(a) timeliness issue developed by the courts of appeals.

II. THE DIVISION IN THE COURTS OF APPEALS ON THE SECTION 106(A) TIMELINESS QUESTION

A. *The Ninth Circuit Approach*

In 1964 the Supreme Court decided *Giova v. Rosenberg*,⁶³ holding that the courts of appeals had jurisdiction under section 106(a) to review denials of motions to reopen. In 1965, the Ninth Circuit decided *Bregman v. INS*.⁶⁴ The Board of Immigration Appeals had rendered a final order of deportation against petitioner Jacob Bregman in April 1963.⁶⁵ Bregman twice moved to reopen the deportation proceedings, first in June 1963, and then again in August.⁶⁶ The BIA denied both motions and the petitioner sought review of these denials and the deportation order in the court of appeals in November 1963. The court stated, without explaining its reasoning:

It follows from *Giova* that if the motion to reopen before the Board is within six months of the final order of deportation and the petition to this court is within six months of the denial of the motion (as it was in this case), this court has jurisdiction to review both the final order of deportation and the denial of the motion to reopen.⁶⁷

In subsequent cases, the rationale for the *Bregman* rule became clearer. For example, in *Yamada v. INS*,⁶⁸ the court considered whether it had jurisdiction to review the denial of a petition for classification as a first preference quota immigrant,⁶⁹ entered after deportation had been ordered.⁷⁰ In the course of its discussion the court compared such an order to a motion to reopen. The court noted that the denial of a motion to reopen is "directly linked with the original proceedings out of which the deportation order arose," and that therefore "it would be artificially literal . . . to attempt to distinguish, for

63. 379 U.S. 18 (1964) (per curiam).

64. 351 F.2d 401 (9th Cir. 1965).

65. 351 F.2d at 402.

66. 351 F.2d at 402.

67. 351 F.2d at 402-03.

68. 384 F.2d 214 (9th Cir. 1967).

69. Under the first preference a total of 54,000 visas may be made available to qualified immigrants who are the unmarried sons and daughters of United States citizens. INA § 203(a)(1), 8 U.S.C. § 1153(a)(1) (1982); see 1 C. GORDON & H. ROSENFELD, *supra* note 9, § 2.27b.

70. The issue presented in *Yamada* was resolved by the Supreme Court in *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968). See Part I.B.3 *supra*.

purposes of Section 106(a), between the final order proper and the denial of a motion to reopen the proceedings.”⁷¹ The court reasoned that the fact that a motion to reopen was “intimately and immediately associated with the principal order”⁷² argued for postponing the running of the six-month time limit while such an order was pending, assuming the six-month period was not allowed to expire before the motion was filed.

The Ninth Circuit also argued that motions to reopen “are . . . protected from abuse by the regulations governing section 242(b) proceedings.”⁷³ It cited two regulatory requirements: (1) a motion to reopen cannot be granted unless the evidence sought to be offered was not available and could not have been discovered or presented at the hearing; and (2) such a motion cannot be granted to allow an application for any form of relief available in a section 242(b) proceeding if the alien’s right to make such an application was fully explained to him at the hearing, unless the basis of the application arose after the hearing.⁷⁴ The Ninth Circuit concluded that the congressional policy of preventing repetitive, meritless appeals was already reflected in these regulations governing motions to reopen and reconsider, thus making a strict view of section 106(a)(1) unnecessary.

The *Yamada* court pointed out that “Congress was . . . concerned with the delay which resulted from multiple court proceedings”⁷⁵ and cited the statement from the House Report that “the overall purpose of the new statute was ‘to create a *single*, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens.’”⁷⁶ The court concluded:

It seems fair to assume from the statutory language, legislative history, and administrative context that Congress visualized a single administrative proceeding in which all questions relating to an alien’s deportation would be raised and resolved, followed by a single petition in a court of appeals for judicial review both of the ultimate question of deportation and of all of the subsidiary questions upon which it might depend.⁷⁷

Thus, in the view of the Ninth Circuit, postponing the running of the time limit “is in keeping with the intention of Congress to create a process in which there is a single judicial review of all questions relat-

71. 384 F.2d at 217 n.5 (quoting Brief for Respondent at 17-18, *Giova v. Rosenberg*, 379 U.S. 18 (1964) (No. 23)); *see also* *Cheng Fan Kwok v. INS*, 392 U.S. at 217.

72. 384 F.2d at 217 n.5 (quoting Brief for Respondent at 18, *Giova*).

73. 384 F.2d at 217.

74. 384 F.2d at 217-18; *see also* *Mondragon v. INS*, 625 F.2d 270, 272 n.4 (9th Cir. 1980).

75. 384 F.2d at 218.

76. 384 F.2d at 218 (quoting H.R. REP. NO. 1086, 87th Cong., 1st Sess. 22 (1961) (emphasis added by the court)).

77. 384 F.2d at 218; *see also* *Cheng Fan Kwok v. INS*, 392 U.S. 206, 215 (1968); *Reyes v. INS*, 571 F.2d 505, 507 (9th Cir. 1978); *Hyun Joon Chung v. INS*, 720 F.2d 1471, 1474 (9th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984).

ing to an alien's deportation."⁷⁸

B. *The Third Circuit Approach*

The Third Circuit was first presented with an opportunity to decide the section 106(a) timeliness issue in 1986. In *Nocon v. INS*,⁷⁹ the Nocons were found deportable on June 20, 1983.⁸⁰ They appealed to the BIA, which affirmed the Immigration Judge's order on October 11, 1984. On October 24, 1984, they filed a motion to reconsider with the BIA, which was denied on April 30, 1985. On July 10, 1985, the Nocons filed a petition for review in the court of appeals, seeking review of both the order denying their motion to reconsider and the October 11, 1984 final deportation order.⁸¹ In deciding the timeliness issue, the court rejected the Ninth Circuit approach.⁸² The court maintained that accepting the Ninth Circuit's analysis

"would defeat the purpose of the statute," since the imposition of the six month period for seeking review of final deportation orders was designed to prevent undue delay in deportation once the alien's immigration status had been decided. Enacting the Immigration and Nationality Act, Congress was especially sensitive to what it designated as "the growing frequency of judicial actions being instituted by undesirable aliens whose cases . . . are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country." Protracted litigation was viewed by Congress as a means of exploiting the judicial process. Thus, permitting aliens the benefit of additional time from their filing of motions to reopen or to reconsider would directly contravene Congressional intent to prevent successive, piecemeal appeals from being used as a dilatory tactic to postpone the execution of deportation orders. Moreover, the six month appeal period [was] seen by Congress to be "sufficient and far beyond the realms of any claim of unfairness, for an alien to determine whether he really has a case upon which he should seek judicial review and to prepare [therefor]."⁸³

78. *Hyun Joon Chung v. INS*, 720 F.2d at 1474. In *Hyun Joon Chung*, the Ninth Circuit also held that when a motion to reopen or reconsider is filed, "an otherwise appealable final order becomes no longer appealable in this court until the motion is denied or the proceedings have been effectively terminated." 720 F.2d at 1474; see also *Fayazi-Azad v. INS*, 792 F.2d 873 (9th Cir. 1986) (following *Hyun Joon Chung*); note 128 *infra*.

79. 789 F.2d 1028 (3d Cir. 1986).

80. 789 F.2d at 1030.

81. 789 F.2d at 1030.

82. 789 F.2d at 1031.

83. 789 F.2d at 1033 (citations and footnote omitted) (quoting *Garcia v. INS*, 690 F.2d 349, 350 (3d Cir. 1982), and H.R. REP. NO. 1086, 87th Cong., 1st Sess., reprinted in 1961 U.S. CODE CONG. & ADMIN. NEWS 2950, 2967, 2973).

The *Nocon* court also noted that "the regulation governing motions to reopen or to reconsider appears to assume the continuing appealability of the original deportation order," 789 F.2d at 1033 n.5, citing the requirement that motions "state whether the validity of the deportation order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status," 789 F.2d at 1033 n.5 (quoting 8 C.F.R. § 3.8(a) (1987)). For a summary of *Nocon*, see 63 INTERPRETER

In light of these congressional concerns, the *Nocon* court concluded that "strict compliance" with the statutory time limit was required. The court stated that under the statute petitions for review "must be filed within six months of the specific order sought to be reviewed."⁸⁴ Thus, the timely filing of a motion to reopen or reconsider would not suspend the six-month limit for seeking review of the original order.⁸⁵

C. *The "Good Faith" Approach of the Second and District of Columbia Circuits*

The compromise approach of the Second and District of Columbia Circuits is as yet relatively undeveloped. In the Second Circuit case *Fu Chen Hsiung v. INS*,⁸⁶ petitioners sought review of a deportation order issued in 1975 and affirmed by the BIA in December 1977, as well as review of three subsequent motions to reopen or reconsider. The court stated its general agreement with the *Bregman* rule, reasoning that "[o]therwise, the party faces the dilemma of taking his case to the BIA, possibly losing the chance to appeal, or appealing and preventing the BIA from acting by depriving it of jurisdiction."⁸⁷ However, the court concluded:

In light of our oft-expressed concern for dilatory tactics in immigration cases, . . . and on the facts of this case, where there have been three applications [to the BIA for discretionary relief], including an initial general one claiming insufficiency of evidence, we hold that it is not appropriate to consider the merits of the deportation orders at this late hour.⁸⁸

This statement implies that the court will follow the *Bregman* rule except in cases involving repeated motions to reopen or reconsider filed for dilatory purposes.

The District of Columbia Circuit has suggested a similar approach. In *Attoh v. INS*,⁸⁹ a deportation order had been issued against petitioner on February 20, 1976. On February 25, 1976, petitioner moved to reopen and reconsider the denial of voluntary departure. The Immigration Judge denied this motion on December 17, 1976, and petitioner appealed this denial to the BIA on December 30, 1976. That appeal was dismissed on November 23, 1977. Petitioner moved to re-

RELEASES 484-87 (1986). For a discussion of whether the filing of a motion to reopen affects the appealability of a final deportation order, see note 128 *infra*.

84. 789 F.2d at 1033 (emphasis in original).

85. 789 F.2d at 1033.

86. No. 79-4012 (2d Cir. May 15, 1979) (LEXIS, Genfed library, USApp file).

87. No. 79-4012 (2d Cir. May 15, 1979). For a discussion of whether the BIA and court of appeals may have simultaneous jurisdiction, see note 128 *infra*.

88. No. 79-4012 (2d Cir. May 15, 1979) (citations omitted). Thus, the only issue before the court was whether the BIA's denial of rehearing and reconsideration was an abuse of discretion.

89. 606 F.2d 1273 (D.C. Cir. 1979).

open the BIA's decision by a petition filed February 28, 1978, and the Board denied this motion on May 26, 1978. A petition for judicial review was then filed on July 14, 1978.⁹⁰ The court, citing the *Bregman* rule, saw no obstacle to reviewing the original deportation proceedings as well as the BIA's refusals to reopen the proceedings.⁹¹ The court's adoption of *Bregman*, however, was qualified:

While the *Bregman* rule might well be troubling in a case where there have been repeated and arguably frivolous motions to reopen or reconsider, the present situation reveals no hint of such dilatory tactics. Indeed, there is every indication that petitioner moved from one procedural stage to the next with some dispatch. Between the February 20, 1976 order and the filing of the instant petition he has had matters pending before the agency for all but about five months and 11 days. Thus for present purposes we are content to adopt *Bregman* only insofar as it implicitly recognizes that intervening good faith petitions for administrative relief may toll or suspend the running of the time limit. We save for another day a variety of related questions, among them whether and under what circumstances a petitioner can obtain a new six-month period for each additional administrative maneuver.⁹²

III. THE GOOD FAITH APPROACH

Neither the statutory language nor the legislative history of section 106 clearly addresses the section 106(a)(1) timeliness question. Yet, the legislative history does reveal that Congress was concerned with preventing repetitive appeals, deterring frivolous and dilatory appeals, and ensuring procedural fairness to aliens. This Part will demonstrate that the good faith approach best answers these concerns. In addition, this Part will argue that the good faith approach is consistent with the Supreme Court's treatment of section 106(a) jurisdiction, its interpretation of time restrictions on judicial review of other administrative decisions, and its attempts to curb frivolous appeals by aliens.

A. The Statutory Language

Section 106(a)(1) provides that "a petition for review may be filed not later than six months from the date of the final deportation order."⁹³ The courts of appeals agree that this language does not dispose

90. 606 F.2d at 1275 & n.15.

91. 606 F.2d at 1275 n.15. Since Attoh did not appeal his deportation order to the BIA, an issue could have been raised as to whether he had exhausted his administrative remedies. The court did not address this point directly, but appears to have been influenced by the confused circumstances under which the immigration judge concluded that Attoh had waived appeal. See 606 F.2d at 1275 & n.14.

92. 606 F.2d at 1276 n.15 (emphasis added).

93. 8 U.S.C. § 1105a(a)(1) (1982). There are no regulations interpreting the meaning of § 106(a)(1). 8 C.F.R. § 243.3 (1987), which defines when "an order of deportation is final and subject to execution," refers to the appropriate time for execution of the deportation order by the INS, rather than to any question of § 106(a) jurisdiction (e.g., § 243.3(a)(4) provides that a de-

of the section 106(a) timeliness question.⁹⁴ This is because section 106(a)(1) does not specify the effect on the time for filing petitions for judicial review of reviewable orders entered *after* the final deportation order. When a motion to reopen or reconsider is filed within six months of the final deportation order and is denied, there are two possible ways of looking at the deportation order and order denying the motion. The Third Circuit characterizes the two orders as "independently reviewable final orders,"⁹⁵ and reasons that the time limit should run from each order separately. The Ninth Circuit, however, looks on the denial of the motion as an adjunct of the principal order.⁹⁶ Under this view, there is, in effect, one "final deportation order" from which the time limit can run. Final action on the later motion, therefore, gives rise to a new six-month period during which review of the principal order can be sought.

B. *The Legislative History*

1. *Background*

Section 106 was enacted as a result of dissatisfaction on the part of Congress and the Eisenhower and Kennedy administrations with several Supreme Court decisions that allowed aliens greater rights of judicial review.⁹⁷ Historically, an alien could challenge a deportation order solely by habeas corpus proceedings, available only after the

portation order "is final and subject to execution upon the date when any of the following occurs: . . . (4) A federal district or appellate court affirms an administrative order of deportation in a petition for review or habeas corpus action"). Cf. *Arch Mineral Corp. v. Director, Office of Workers' Compensation Programs*, 798 F.2d 215, 218 (7th Cir. 1986) (term "final order" as used in the statute should be construed as distinct from the term "final decision" as used in the regulation, which refers to "the point at which the decision of the Department of Labor is no longer reviewable by any authority, judicial or administrative"); see also 8 C.F.R. § 243.1 (1987) (specifying when an order of deportation becomes final).

94. See, e.g., *Nocon v. INS*, 789 F.2d 1028, 1031 (3d Cir. 1986) ("this precise question is not covered by the Congressional statute").

95. 789 F.2d at 1033. The Third Circuit draws strength for this position from the fact that a court of appeals may in certain circumstances have jurisdiction to review a denial of a motion to reopen without having jurisdiction to review the underlying deportation order. 789 F.2d at 1031-33; note 88 *supra* and accompanying text; 2 C. GORDON & H. ROSENFELD, *supra* note 9, § 8.9Ab, at 8-88.

96. See, e.g., *Yamada v. INS*, 384 F.2d 214, 217 n.5 (9th Cir. 1967) (the denial of a motion to reopen is "directly linked with the original proceedings out of which the deportation order arose," and therefore "it would be artificially literal . . . to attempt to distinguish . . . between the final order proper and the denial of a motion to reopen the proceedings") (quoting Brief for Respondent at 17-18, *Giova v. Rosenberg*, 379 U.S. 18 (1964) (No. 23)).

97. See Letter from Deputy Attorney General Lawrence E. Walsh to Congressman Emanuel Celler (Mar. 30, 1959), reprinted in H.R. REP. NO. 1086, 87th Cong., 1st Sess. 25-26 (1961); Letter from Deputy Attorney General Byron R. White to Congressman Emanuel Celler (Apr. 18, 1961), reprinted in H.R. REP. NO. 1086, 87th Cong., 1st Sess. 24-25 (1961). See generally Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760 (1962). As early as 1952, there were proposals for the creation of a statutory form of judicial review of deportation orders. See PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM SHALL WE WELCOME 169-70 (1953).

alien had been taken into custody.⁹⁸ In 1954, an equally divided Supreme Court affirmed per curiam a holding by the District of Columbia Circuit that deportation orders were reviewable in actions for declaratory judgment as well.⁹⁹ The following year the Court held that deportation orders could be judicially reviewed in actions for declaratory and injunctive relief under Section 10 of the Administrative Procedure Act.¹⁰⁰

During this same period, there were several highly publicized cases of aliens who were able to evade deportation for long periods of time through protracted and repetitive litigation.¹⁰¹ As a result of frustration with this situation, the Attorney General proposed legislation similar to section 106 in 1954.¹⁰² In 1956¹⁰³ and 1957,¹⁰⁴ President Eisenhower urged Congress to enact legislation "limiting and carefully defining the judicial process"¹⁰⁵ with respect to deportation and exclusion orders.

When Congress finally enacted such legislation in 1961, its intent was to solve what it saw as the problem of "the growing frequency of

98. *Judicial Review of Deportation and Exclusion Orders: Hearings on H.R. 13311 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 85th Cong., 2d Sess. 23 (1958) [hereinafter *House Hearings*] (statement of Malcolm Anderson, Assistant Attorney General, Criminal Division). See also 2 C. GORDON & H. ROSENFELD, *supra* note 9, § 8.2.

99. *Brownell v. Rubinstein*, 346 U.S. 929 (1954).

100. *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955). The Justice Department contended: "There are several objections to the divergent methods of review. They lack uniformity. They are not mutually exclusive. They result in a delay in deporting an alien who should be deported. There is need for expedition, orderly venue, and the avoiding of repetitious court proceedings." *House Hearings*, *supra* note 98, at 23 (statement of Malcolm Anderson, Assistant Attorney General, Criminal Division).

101. See Letter of Attorney General William P. Rogers to Senator Sam J. Ervin, Jr. (Mar. 25, 1959), reprinted in H.R. REP. NO. 565, 87th Cong., 1st Sess. 6-7 (1961); H.R. REP. NO. 565, 87th Cong., 1st Sess. 7-11, 20-26 (1961). For example, William Heikkila, against whom deportation proceedings were begun in 1948, still had appeals pending at the time of his death in 1960. See H.R. REP. NO. 565, 87th Cong., 1st Sess. 20-23 (1961).

102. See Brief for Petitioner at 56-60, *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955) (No. 374). The Attorney General's proposed legislation would have placed jurisdiction in the district courts instead of the courts of appeals and had no provision for a time limit on filing petitions for judicial review.

Whether jurisdiction should be placed in the district courts or in the courts of appeals continued to be a hotly debated issue during the years preceding the enactment of § 106. See, e.g., H.R. REP. NO. 423, 86th Cong., 1st Sess. 28 (1959) (statement of John V. Lindsay); *Senate Hearings*, *supra* note 24, at 2 (testimony of Sen. Keating); 107 CONG. REC. 19,651 (1961) (statement of Sen. Keating) (endorsing proposed amendments to, among other things, lengthen the time limit to one year and provide for review in the district courts instead of the courts of appeals).

103. See H.R. Doc. No. 329, 84th Cong., 2d Sess. 6 (1956), quoted in H.R. REP. NO. 565, 87th Cong., 1st Sess. 2-3 (1961). The President said in part:

[T]here is . . . a significant need to strengthen the laws established for the wholesome purpose of ridding the country of the relatively few aliens who have demonstrated their unfitness to remain in our midst. Some of these persons have been found to be criminals of the lowest character, trafficking in murder, narcotics, and subversion.

104. See H.R. Doc. No. 85, 85th Cong., 1st Sess. 5 (1957), quoted in H.R. REP. NO. 565, 87th Cong., 1st Sess. 2 (1961).

105. H.R. Doc. No. 85, 85th Cong., 1st Sess. 5 (1957).

judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country."¹⁰⁶ Although Congress did not explicitly make this division, its main concerns in enacting section 106 can be outlined as follows: (1) prevention of *repetitious* appeals; (2) prevention of *frivolous* appeals; and (3) prevention of delay in deportation of aliens as a result of (1) and (2). A fourth congressional concern was ensuring fairness to aliens facing deportation. This section argues that the above concerns are best met through the good faith approach. With respect to the running of the time limit on filing petitions for judicial review, the legislative history is ambiguous, although clearly at least some members of Congress favored an interpretation of section 106(a)(1) that is consistent with the good faith approach.

2. Congressional Intent Concerning the Running of the Section 106(a)(1) Time Limit

The running of the section 106(a)(1) time limit was discussed several times during the debates and hearings leading up to the enactment of section 106. Unfortunately, it is impossible to discern any clear congressional intent on the timeliness question from this legislative history. The debate on H.R. 2807, a predecessor to the bill containing section 106, illustrates this ambiguity:

Mr. Lindsay. . . . As the gentleman knows, the proposed bill provides that a petition for review may be filed not later than 6 months from the date of the final deportation order or from the date of this act, whichever is the later. Do I understand that that means that the 6-month period will not benefit the alien until the exhaustion of all the administrative remedies of whatever sort? Is that correct?

Mr. Walter. That is correct.

Mr. Lindsay. The gentleman knows that the immigration regulations are complicated and subject to change by the executive branch. The administrative review of orders of deportation sometimes can take different courses; so I would suggest that we make sure that the history of this is absolutely clear, that if there is any remedy on the administrative level left of any nature, that the deportation order will not be considered final.

Mr. Walter. That is correct. The final order means the final administrative order.¹⁰⁷

106. H.R. REP. NO. 565, 87th Cong., 1st Sess. 1-2 (1961).

107. 105 CONG. REC. 12,728 (1959). During the same debate, Congressmen Lindsay, Moore, and Walter further discuss this issue. However, this discussion is inconclusive: whereas Congressman Lindsay takes the view that the six-month period would not begin to run until after "the exhaustion of all administrative remedies," including a motion to reopen to apply for suspension of deportation, Congressman Moore appears to flip-flop on the issue, while Congressman Walter states that "the 6 months' period . . . applies to the final administrative adjudication of the applications for suspension of deportation just as it would apply to any other issue brought up in deportation proceedings." *Id.* Walter's statement appears to refer to a request for suspension made to the immigration judge during the deportation hearing rather than a motion to reopen to

Although it is clear from the context¹⁰⁸ that Lindsay is asking whether the running of the time limit can be delayed by the filing of requests for discretionary relief after the deportation hearing, Walter's response is ambiguous. He may simply be referring to the language of the bill, which requires the alien to exhaust the administrative remedies available to him "as of right"¹⁰⁹ before filing a petition for judicial review. This latter provision refers to the requirement that the alien appeal the deportation order to the BIA before filing a petition for judicial review; it does not require an alien to file a request for any optional relief such as a motion to reopen to apply for suspension of deportation.

3. *Prevention of Repetitive Appeals*

While the intent of Congress on the specific issue of the section 106(a)(1) time limit is unclear, Congress did state that its overall purpose in enacting section 106 was the creation of "a single, separate, statutory form of judicial review"¹¹⁰ of deportation orders. One of its major concerns was with "*repetitive* appeals to the busy and over-worked courts."¹¹¹ Congress intended to "curtail, if not to eliminate"¹¹² such repetitious litigation through the establishment of a "special statutory form of judicial review of deportation orders"¹¹³ and through the provisions of section 106 that provided that an order of deportation could not be reviewed by a court if the alien had not exhausted his administrative remedies, if he had departed from the United States, or if the validity of the deportation order had been pre-

apply for suspension, so is not germane to the question Lindsay is asking. *See also House Hearings, supra* note 98, at 15-16, 48-49, 57, 61-63; H.R. REP. NO. 2478, 85th Cong., 2d Sess. 22 (1958); 104 CONG. REC. 17,174-75 (1958).

108. Congressman Lindsay gives the following explanation of his remarks:

A moment ago I asked the gentleman from Pennsylvania [Mr. Walter] whether or not it was correct to say that the 6 months period would not begin to run until after the exhaustion of all administrative remedies. In my question I assumed that suspension of deportation would be included as an administrative remedy. In other words, the question of deportability would be decided one way or the other. Assuming the alien was found to be deportable, then he goes back for further administrative relief. He asks for suspension of deportation proceedings. It may take a while before there is a determination on that question. 105 CONG. REC. 12,728 (1959).

109. H.R. 2807 (1959), *reprinted in* 105 CONG. REC. 12,723-24 (1959).

110. H.R. REP. NO. 565, 87th Cong., 1st Sess. 1 (1961); *but cf. Senate Hearings, supra* note 25, at 4-5 (statement of Sen. Keating) (noting that "multiple court cases may not be avoided even by [the enactment of section 106] if steps are not taken to prevent multiple administrative decisions involving the same alien"; giving the example of a deportation hearing followed by a motion to reopen and a decision on place of deportation).

111. H.R. REP. NO. 565, 87th Cong., 1st Sess. 2 (1961) (emphasis added); *see also id.* at 1 (noting "the growing frequency of judicial actions" by aliens); *id.* at 2 ("repeated judicial reviews and appeals") (quoting H. DOC. 85, 85th Cong., 1st Sess. (1957)); *id.* at 7-11 (detailing the "chronology of litigation in deportation proceedings against Carlos Marcello" and noting that Marcello's court actions were "repetitious" and "multitudinous").

112. *Id.* at 14.

113. *Id.* at 13.

viously determined in any judicial proceeding.¹¹⁴ Thus, one of Congress's main concerns was with establishing a procedure under which the courts would not be overburdened with repetitive actions brought by aliens challenging their deportation.¹¹⁵

The good faith approach addresses these concerns. Aliens who have filed nonfrivolous motions to reopen would be able to postpone bringing a petition for judicial review (and, indeed, could postpone the decision as to *whether* to petition for judicial review at all) until after their motion had been adjudicated. By contrast, under the Third Circuit's approach, if the motion had not been decided within six months of the deportation order, the alien would have to bring a petition for judicial review of the deportation order, and then a separate petition for review if the motion to reopen was denied.

4. *Prevention of Frivolous and Dilatory Appeals*

In enacting section 106, Congress also voiced a strong belief that many aliens were bringing frivolous actions challenging their deportation orders. For example, the report of the House Committee on the Judiciary accompanying H.R. 187 (a predecessor to the bill containing section 106)¹¹⁶ speaks of "judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country."¹¹⁷ Congress hoped that the new judicial review procedures would curtail the number of frivolous and dilatory appeals. The good faith approach is consistent with these concerns, since it prevents aliens from using frivolous administrative

114. See *id.* at 14-15; Part I.A *supra*.

115. See, e.g., 107 CONG. REC. 12,177 (1961) ("The Federal courts which are very congested today will be relieved of a great burden, under this bill . . .").

116. Predecessors to S. 2237, the bill containing § 106, were introduced during the 84th through 87th Congresses. See 102 CONG. REC. 2430 (1956); 102 CONG. REC. 2289 (1956); 103 CONG. REC. 73 (1957); 103 CONG. REC. 255 (1957); 104 CONG. REC. 3493 (1957); 104 CONG. REC. 8632 (1958); 104 CONG. REC. 13,105 (1958); 105 CONG. REC. 855 (1959); 107 CONG. REC. 39 (1961); 107 CONG. REC. 12,070 (1961). House Reports were issued on H.R. 13,311, H.R. 2807, and H.R. 187, introduced during the 85th, 86th, and 87th Congresses, respectively. See H.R. REP. NO. 2478, 85th Cong., 2d Sess. (1958); H.R. REP. NO. 423, 86th Cong., 1st Sess. (1959); H.R. REP. NO. 565, 87th Cong., 1st Sess. (1961). S. 2237 was reported in S. REP. NO. 646, 87th Cong., 1st Sess. (1961), H.R. REP. NO. 1086, 87th Cong., 1st Sess. (1961), and H.R. CONF. REP. NO. 1172, 87th Cong., 1st Sess. (1961).

117. H.R. REP. NO. 565, 87th Cong., 1st Sess. 1-2 (1961); see also *id.* at 2 ("frivolous claims of impropriety in the deportation proceedings"); *id.* ("Many of these claims have constituted unjustified attacks upon the constitutionality of the Immigration and Nationality Act, but no such attacks have ever been sustained by the Supreme Court of the United States."); *id.* ("appeals for the sole purpose of delaying their justified expulsion from this country") (quoting H. Doc. 85, 85th Cong., 1st Sess. 5 (1957)); *id.* ("cases brought for purposes of delay") (quoting H. Doc. 85, 85th Cong., 1st Sess. 5 (1957)); *id.* at 7 ("under the present laws racketeers and other undesirables can frustrate deportation by repeated dilatory actions") (quoting Letter from Attorney General William P. Rogers to Senator Sam J. Ervin, Jr. (Mar. 25, 1959)); *id.* at 12-13 (discussing examples of frivolous appeals).

motions to delay the running of the time limit on filing petitions for judicial review of final deportation orders. The Ninth Circuit approach, however, fails to meet these concerns. By allowing the filing of any motion to reopen or reconsider, no matter how groundless, to delay the time period for appealing the final deportation order, it appears to encourage the filing of frivolous motions merely to delay deportation.

5. *Fairness to Aliens*

Congress was also concerned with charges by critics of the predecessors to the bill containing section 106 that the rights of aliens to judicial review might be impeded or prematurely cut off by the proposed review procedure.¹¹⁸ As a result, the proposed time limit was lengthened from 60 days¹¹⁹ to six months and the use of typewritten briefs in the courts of appeals was allowed.¹²⁰ In the debates on the bill, Congressman Walter emphasized that “[t]his bill does not prevent any alien from seeking judicial review of administrative orders of deportation. . . . It sets up a single, expeditious, and *fair* method of judicial review”¹²¹ In particular, Congress felt that providing for judicial review in the courts of appeals gave the alien “greater rights, greater security, and more assurance of a close study of his case by experienced judges.”¹²² The good faith approach is consistent with this emphasis on fairness because it ensures that aliens who are pursuing administrative motions in good faith will not have their right to judicial review of their deportation order cut off.

C. *Judicial Economy and the Review of Administrative Orders*

The good faith approach postpones the running of the time limit for filing a petition for judicial review of a deportation order while motions to reopen or reconsider, made in good faith and not simply for purposes of delay, are pending. Such an approach addresses the judicial economy concerns animating both the Supreme Court’s interpretation of section 106(a) jurisdiction and its treatment of appellate

118. See, e.g., *House Hearings*, *supra* note 98, at 66-67 (statement by Women’s International League for Peace and Freedom).

119. See H.R. 12,487, 85th Cong., 2d Sess. (1958).

120. See H.R. 13,311, 85th Cong., 2d Sess. (1958), reprinted in *House Hearings*, *supra* note 98, at 1-3; *House Hearings*, *supra* note 97, at 15 (testimony of Rep. Celler); H.R. REP. NO. 565, 87th Cong., 1st Sess. 14 (1961); 105 CONG. REC. 12,728 (1959) (statement of Rep. Moore) (six months is greatly in excess of the usual period for reviewing administrative determinations).

121. 107 CONG. REC. 12,175 (1961) (emphasis added).

122. H.R. REP. NO. 565, 87th Cong., 1st Sess. 14 (1961); see also *id.* at 14-15 (“[T]he alien is guaranteed the right to bring an action in a court most convenient to him.”); *id.* at 15 (alien is “guaranteed a trial de novo if he raises a substantial claim of U.S. nationality”); *id.* at 15 (validity of a deportation order may be challenged in a criminal proceeding brought against an alien under § 242(d) or (e) of the INA); *id.* at 15 (right to habeas corpus review preserved to an alien in custody under a deportation order).

review of administrative orders in nonimmigration contexts. In contrast, the approach of the Third Circuit, which treats the initial deportation order and subsequent motions to reopen or reconsider as separate and distinct orders, frustrates judicial economy by requiring a bifurcated review process in many cases.

1. *The Consistency of the Good Faith Approach with Supreme Court Interpretation of Section 106(a)*

The good faith approach is consistent with the Supreme Court's interpretation of the section 106(a) jurisdiction of the courts of appeals.¹²³ The Court has described motions to reopen or reconsider as being " 'intimately and immediately associated' with the final orders they seek to challenge."¹²⁴ As the Court explained in *Cheng Fan Kwok*, such motions are essentially continuations of the proceeding that begins with a section 242(b) hearing before an immigration judge.¹²⁵ Thus, although "[a]n essential premise of *Foti* was . . . that the application of § 106(a) had been limited to orders 'made during the same proceedings in which deportability is determined,' "¹²⁶ "[t]he result in *Giova* [holding that denials of motions to reopen were reviewable under § 106(a)] was . . . a logical concomitant of the construction of § 106(a) reached in *Foti*; it did not, explicitly or by implication, broaden that construction."¹²⁷

Given that motions to reopen or reconsider are continuations of the deportation proceeding, it is logical to postpone the running of the time limit for filing a petition for judicial review until the motion is decided, at least where such motions are not filed simply for purposes of delay.¹²⁸ Since review of the denial of discretionary relief is closely

123. See Part I.B *supra*.

124. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 217 (1968) (quoting Brief for Respondent at 53, *Foti v. INS*, 375 U.S. 217 (1963) (No. 28)); see also note 56 *supra* and accompanying text.

125. *E.g.*, 392 U.S. at 216 ("We hold that the judicial review provisions of § 106(a) embrace only those determinations made during a proceeding conducted under § 242(b), including those determinations made incident to a motion to reopen such proceedings") (emphasis added).

126. 392 U.S. at 217 (quoting *Foti*, 375 U.S. at 224).

127. 392 U.S. at 217; see also 392 U.S. at 217 & n.19 ("petitions to reopen deportation proceedings are governed by the regulations applicable to the deportation proceeding itself") (citing 8 C.F.R. § 242.22 (1968)).

128. A separate issue is whether the filing of a motion to reopen or reconsider deprives the court of appeals of jurisdiction to review the final deportation order while the motion remains unadjudicated. In a recent Ninth Circuit case, *Fayazi-Azad v. INS*, 792 F.2d 873 (9th Cir. 1986), the petitioner filed a motion to reopen in December 1984 and a petition for review of the final deportation order in May 1985. At the time he filed his petition for review, the motion had not yet been adjudicated by the BIA. In dismissing the petition, the court held that "[w]here a petitioner elects to file a motion to reopen before seeking judicial review, the 'otherwise appealable final order becomes no longer appealable in this court until the motion is denied or the proceedings have been effectively terminated.' " 792 F.2d at 874 (quoting *Hyun Joon Chung v. INS*, 720 F.2d 1471, 1474 (9th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984)) (emphasis in original). Other circuits have taken sharply differing positions on this issue. The Third Circuit has suggested that in such a situation, the BIA and the court of appeals would have simultaneous

associated with review of the original order, considerations of judicial economy suggest that both determinations should be made by the same court at the same time.¹²⁹ In addition, consideration of the

jurisdiction. See *Nocon v. INS*, 789 F.2d 1028, 1033 n.5 (3d Cir. 1986). The Second Circuit has stated that when a judicial appeal is taken, the BIA is deprived of jurisdiction. See *Fu Chen Hsiung v. INS*, No. 79-4012 (2d Cir. May 15, 1979).

While a full discussion of this jurisdictional issue is beyond the scope of this Note, the Third Circuit's position — that jurisdiction may be simultaneous — appears to be in accord with long-standing practice. See, e.g., Hurwitz, *supra* note 30, at 84 ("[C]ourt actions often take place contemporaneously with a motion to reopen before the Board."); see also 63 INTERPRETER RELEASES 658 (1986) (characterizing the *Fayazi-Azad* holding as "novel"); 2 C. GORDON & H. ROSENFELD, *supra* note 9, § 8.4a, at 8-24; cf. 104 CONG. REC. 17,175 (1958) (debate on a predecessor to the bill that contained section 106) (statement of Rep. Keating) (urging "contemporaneous court consideration of deportability and administrative application for relief"); *Mortazavi v. INS*, 719 F.2d 86 (4th Cir. 1983) (at request of petitioner, petition to review the order of deportation held in abeyance awaiting disposition of motion to reopen). In addition, the regulations governing motions to reopen appear to assume that administrative and court actions may be carried on simultaneously. See 8 C.F.R. § 3.8(a) (1987) (motion must "state whether the validity of the deportation order has been or is the subject of any judicial proceeding"); *Nocon*, 789 F.2d at 1033 n.5.

The Ninth Circuit's position in *Fayazi-Azad*, however, is consistent with the *Bregman* rule. See *Fayazi-Azad*, 792 F.2d at 874 ("Because the time for filing a petition for judicial review on the underlying order does not begin to run until the agency acts upon the motion to reopen, it is not necessary for a petitioner to file a protective appeal from the BIA's original decision . . ."). In addition, it may be motivated by a desire to minimize interference in the administrative process. Cf. *Civil Aeronautics Bd. v. Delta Air Lines*, 367 U.S. 316, 326 (1961) (referring to "the general notion that an administrative order is not 'final,' for the purposes of judicial review, until outstanding petitions for reconsideration have been disposed of") (emphasis in original), discussed in 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26:12, at 469-70 (2d ed. 1983); *ICC v. Brotherhood of Locomotive Engrs.*, 107 S. Ct. 2360, 2368-69 (1987), discussed in note 135 *infra* and accompanying text; *Roque-Carranza v. INS*, 778 F.2d 1373 (9th Cir. 1985) (alien proffering new evidence was required to file a motion to reopen with the BIA; that procedure avoids interference with agency's processes). However, the Ninth Circuit's position fails to take into account the possibility that the alien will be unable to obtain a stay of deportation and will be deported while waiting for his motion to be adjudicated. See note 36 *supra*. For example, in *Fayazi-Azad*, the court stayed its mandate for 30 days "[i]n order to afford Fayazi-Azad the opportunity to seek a stay of deportation from the BIA pending resolution of his motion to reopen." 792 F.2d at 874. The court did not explain what it thought Fayazi-Azad's appropriate course of action should be if the BIA refused to grant a stay. Although there are tactics an alien can use to attempt to stay in the country despite his failure to obtain an administrative stay, see note 151 *infra*, it seems inappropriate to force an alien to choose between engaging in expensive and possibly fruitless litigation, and losing his right to judicial review of his deportation order.

The Ninth Circuit has on occasion issued stays of deportation to prevent aliens from being deported before their motion is adjudicated. In *Dhangu v. INS*, 812 F.2d 455, 461 (9th Cir. 1987), the court stayed its mandate "for such time as is necessary for disposition of [the motion to reopen] currently pending before the BIA." In *Roque-Carranza v. INS*, 778 F.2d 1373, 1374 (9th Cir. 1985), the court ordered a stay of deportation for 60 days to allow the petitioner to file a motion to reopen and "for such further time as is necessary for the disposition of the motion by the BIA." However, this approach is of doubtful validity given the lack of any basis in the statute or the regulations for the granting of a stay by the court of appeals except during the pendency of a petition for judicial review. See *Larimi v. INS*, 782 F.2d 1494, 1497 (9th Cir. 1986) ("There is no justification for the courts to create any new rights to a stay as a matter of federal common law.") (purporting to distinguish *Roque-Carranza*). Thus, this does not appear to be a viable way to solve the difficulties created by the *Fayazi-Azad* decision.

129. Cf. Brief for Respondent at 18-21, *Giova v. Rosenberg*, 379 U.S. 18 (1964) (No. 23) (discussing the desirability of the denial of a motion to reopen and the deportation order being reviewed together in the court of appeals); notes 49, 56, & 69-72 *supra* and accompanying text. Concededly, even under the Third Circuit approach, if the petition for review of the deportation order were still pending at the time the motion was decided, it would be open to the alien to file a

alien's claims in a motion to reopen or reconsider by the BIA will sometimes eliminate the need for judicial review.¹³⁰ As the Court emphasized in *Foti*, the major purpose behind section 106(a) was to create an expeditious form of judicial review that would prevent aliens from tying up the courts with repeated meritless appeals.¹³¹ Postponing the running of the time limit only where aliens pursue motions to reopen or reconsider on a nonfrivolous basis satisfies both of Congress's main concerns: preventing repeated recourse to the courts and expediting the departure of aliens with no arguable basis for extending their stay.¹³²

2. Judicial Review of Nonimmigration Administrative Decisions

In a majority of cases involving appellate review of administrative orders, courts have held that, where the applicable statute and regulations are silent, the timely filing of a motion to reconsider or similar motions suspends the time for filing a petition for judicial review.¹³³

second petition for review of the motion and then move to consolidate the two petitions. See 63 INTERPRETER RELEASES 487, 659 (1986). However, there would be many cases in which the two orders would be reviewed separately because the motion was still pending at the time the deportation order was reviewed.

In addition to it being more efficient to review both orders at the same time, it would seem to be more conceptually practical as well, especially in the case of motions to reconsider. One commentator on *Nocon* has written:

If a proper motion to reconsider had been filed, requiring adjudication of the motion on its merits, the Board would have had to review its original decision before it could determine the merits of the motion to reconsider. (If, for example, the Board were to sustain a deportation order on a ground not authorized by the statute, and this were the basis of a motion to reconsider, it is difficult to see how the Board could consider the merits of that motion without at least having recourse to its original decision). Consequently, on judicial review of the Board's order denying the motion to reconsider, the reviewing court would also have to have recourse to the Board's original order, even though that order was entered more than six months before the petition for review was filed.

63 INTERPRETER RELEASES 487 (1986).

130. Legomsky, *supra* note 38, at 1332. Cf. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982) (per curiam) ("in order to prevent unnecessary appellate review," district court under FED. R. APP. P. 4(a)(4) has "authority to entertain a timely motion to alter or amend the judgment under Rule 59, even after a notice of appeal ha[s] been filed"); 28 U.S.C.A. FED. R. APP. P. 4 (West 1980) notes of advisory committee on appellate rules (1979 Amendment; Note to Subdivision (a)(4)) ("[I]t would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from.").

131. 375 U.S. at 224.

132. As noted by the Court in *Foti*, a major concern of Congress in enacting § 106 was the prevention of exploitation of the judicial process by aliens "whose cases have no legal basis or merit." 375 U.S. at 225 (quoting H.R. REP. NO. 1086, 87th Cong., 1st Sess. 23 (1961)) (emphasis added); see also *Agosto v. INS*, 436 U.S. 748, 756 (1978) ("Congress was primarily concerned with the filing of repetitive petitions for review and with frivolous claims of impropriety in the deportation proceedings."); Parts III.B.3 & III.B.4 *supra*.

133. *Arch Mineral Corp. v. Director, Office of Workers' Compensation Programs*, 798 F.2d 215, 218 (7th Cir. 1986). For examples of cases holding that the timely filing of the motion suspends the running of the time limit, see *C.O.D.E., Inc. v. ICC*, 768 F.2d 1210, 1211-12 (10th Cir. 1985); *Nordell v. Heckler*, 749 F.2d 47, 48-49 (D.C. Cir. 1984); *American Trucking Assns. v. ICC*, 697 F.2d 1146, 1148 & n.* (D.C. Cir. 1983); *B.J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1114-15 (8th Cir. 1977); *Tiger Intl., Inc. v. CAB*, 554 F.2d 926, 931 n.10 (9th Cir.), *cert. denied*,

These courts base their result on considerations of judicial economy, reasoning that “[i]t is obviously wasteful of the resources of the courts to burden them with objections to administrative action which may be obviated by agency action on reconsideration.”¹³⁴

Recently the Supreme Court adopted the majority approach in a case involving review of orders of the Interstate Commerce Commission. The Court held that “[w]hile the petition for review was filed more than 60 days after that order was served, we conclude that it was nonetheless effective, because the timely petition for administrative reconsideration stayed the running of the . . . limitation period until the petition had been acted upon by the Commission.”¹³⁵ This interpretation is consistent with this Note’s approach to the section 106(a) timeliness question.

434 U.S. 975 (1977); *Tullman v. Udall*, 324 F.2d 411, 416-17 (D.C. Cir. 1963), *revd. on other grounds*, 380 U.S. 1 (1965); *Samuel B. Franklin & Co. v. SEC*, 290 F.2d 719, 723-24 (9th Cir.) (en banc), *cert. denied*, 368 U.S. 889 (1961); *Montship Lines v. Federal Maritime Bd.*, 295 F.2d 147, 151 (D.C. Cir. 1961); *Outland v. CAB*, 284 F.2d 224, 227-28 (D.C. Cir. 1960). For examples of cases taking the opposite view, see *Selco Supply Co. v. United States EPA*, 632 F.2d 863, 865 (10th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Nappi v. Commissioner*, 58 T.C. 282, 283-84 (1972).

134. *Arch Mineral Corp. v. Director, Office of Workers’ Compensation Programs*, 798 F.2d 215, 219 (7th Cir. 1986); *see also Nordell v. Heckler*, 749 F.2d 47, 49 (D.C. Cir. 1984) (“[O]ur view of what constitutes ‘final action’ by the EEOC will promote judicial economy by encouraging employees to exhaust their administrative remedies before filing suit.”).

Courts have also drawn an analogy between filing motions to reopen or reconsider in the context of judicial review of administrative orders and the operation of certain rules governing review of federal court decisions. *See, e.g., Nordell*, 749 F.2d at 48-49 (“a timely request for judicial reconsideration automatically extends the time for filing a notice of appeal or a petition for writ of certiorari”); *Arch Mineral Corp.*, 798 F.2d at 218 (“[V]arious federal rules of appellate procedure that provide for the suspension of the time for filing an appeal while particular motions in the nature of reconsideration are pending in the lower court . . . do not govern the matter before us although they are suggestive.”). *See generally* *Leishman v. Associated Wholesale Elec. Co.*, 318 U.S. 203 (1943) (when a motion is made under Federal Rule 52(b) to amend and supplement the findings, the time for taking an appeal from the judgment runs from the date of the order disposing of the motion); *FED. R. CIV. P. 74(a)* (full time for appeal from the magistrate’s judgment starts to run anew from entry of order disposing of certain postjudgment motions); *Foti v. INS*, 308 F.2d 779, 793 (2d Cir. 1962) (comparing applications for discretionary relief in deportation cases to postjudgment motions in civil cases) (dissenting opinion), *revd.*, 375 U.S. 217 (1963); *Cheng Fan Kwok v. INS*, 392 U.S. 206, 217 (1968) (comparing motions to reopen to motions for rehearing or reconsideration). *FED. R. APP. P. 4(a)(4)* provides, in part:

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.

See also *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam) (under *FED. R. APP. P. 4(a)(4)*, when a premature notice of appeal is filed, the court of appeals lacks jurisdiction to act).

135. *ICC v. Brotherhood of Locomotive Engrs.*, 107 S. Ct. 2360, 2368 (1987). The Court did not rely on any policy arguments, *cf.* note 134 *supra* and accompanying text, but rather stated that the filing of the petition for reconsideration rendered the underlying order “nonfinal.” 107 S. Ct. at 2368-69. For the reasons discussed in note 128 *supra*, this Note argues that with respect to deportation orders, the question of the running of the time limit and the question of finality for purposes of judicial review should be considered separately.

D. *Frivolous Appeals by Aliens*

The good faith approach not only satisfies judicial economy concerns, but also lessens the incentive to file frivolous motions. An alien who knows that the pendency of a frivolous motion will not preserve her right to review of the original order will have less incentive to file the motion.¹³⁶ To the extent that an alien is pursuing administrative motions in good faith, the good faith approach makes judicial intervention unnecessary until the administrative process is complete.¹³⁷ This section first discusses the Supreme Court's condemnation of frivolous appeals by aliens. It then argues that the Ninth Circuit's approach to the section 106(a) timeliness question fails to address this problem. The Third Circuit's approach, on the other hand, is overinclusive in that it sacrifices judicial economy concerns even in cases in which aliens are pursuing administrative remedies in a nonfrivolous manner.

1. *Rios-Pineda and Supreme Court Treatment of Frivolous Appeals*

The good faith approach is consistent with the Supreme Court's

136. It could be argued that for aliens who have no realistic hope of staying in the country permanently, and are merely attempting to postpone their ultimate departure with frivolous or dilatory motions to reopen or reconsider, the possibility of losing the right to judicial review of their deportation order will have little or no deterrent effect. This is because such aliens could still file a petition for review of the denial of their motion and receive an automatic stay under § 106(a)(3). However, in such cases the good faith approach would give added flexibility to courts and to INS officials who may wish to move such aliens out of the country. For example, the INS could move for summary affirmance or to dissolve the automatic stay. See Legomsky, *supra* note 38, at 1336. Under the good faith approach the argument for such a motion would carry added weight. The government could argue that the alien had already lost his right to review of the deportation order through the filing of frivolous motions and that a petition for review of the denial of a frivolous motion was likewise frivolous. One practical problem with this procedure is that the alien must be given the opportunity to respond to the motion. If the motion is denied, the net effect may be to set back the briefing schedule and increase the delay. See *id.* at 1336 & nn. 248-49; 2 C. GORDON & H. ROSENFELD, *supra* note 9, § 8.9Af, at 8-94.10 to -94.11. However, as outlined above, it appears likely that the good faith approach would make it easier for courts to grant such motions.

Another avenue for decreasing the frequency of frivolous appeals is the use of sanctions. The BIA has the power to impose sanctions on attorneys who file frivolous motions to reopen or reconsider. See 8 C.F.R. § 3.1(d)(3) (1987); Note, *Frivolous Appeals vs. Zealous Representation in Immigration Cases: Standards, Trends, and Due Process Concerns*, 1 GEO. IMM. L.J. 291, 293 (1986). Courts could also more frequently sanction attorneys who bring frivolous § 106(a) petitions. See Legomsky, *supra* note 38, at 1336; 2 C. GORDON & H. ROSENFELD, *supra* note 9, § 8.9Af, at 8-94.11 & nn.86-88.

One commentator has suggested that § 106(c) be amended to allow appeals and at least some motions to reopen to be brought after the alien has left the country. At the same time, most aliens would be required to leave after losing before the BIA, or perhaps even after losing before the immigration judge. This reform would apparently eliminate the opportunity to file most dilatory appeals and motions. See Martin, *supra* note 62, at 815-19.

137. An exception would be the case where the alien is unable to obtain an administrative stay of deportation while her motion is pending before the BIA. In that case she might resort to filing a § 106(a) petition of her deportation order in order to obtain an automatic stay of deportation under § 106(a)(3).

treatment of frivolous appeals by aliens. In *INS v. Rios-Pineda*,¹³⁸ the Court voiced its strong disapproval of aliens who attempt to obtain benefits under the immigration laws after delaying their departure through frivolous appeals.

In *Rios-Pineda*, the Court unanimously upheld a BIA discretionary denial of a motion to reopen for suspension of deportation purposes. The Court emphasized the discretionary nature of the relief requested.¹³⁹ In discussing the reasons justifying the Board's denial of the motion, the Court made it clear that it was evaluating the BIA's decision in light of the facts of the case,¹⁴⁰ which in its view pointed to both frivolous appeals and flagrant violations of the immigration laws:

First, although by the time the BIA denied the motion, respondents had been in this country for seven years, that was not the case when suspension of deportation was first denied; the seven years accrued during the pendency of respondents' appeals. The BIA noted that respon-

138. 471 U.S. 444 (1985).

139. 471 U.S. at 449.

140. Respondents in *Rios-Pineda*, husband and wife, were Mexican citizens. The husband entered the United States illegally in 1972, was apprehended by the INS, and was permitted to leave the country voluntarily in early 1974 without the institution of deportation proceedings. Two months later, the couple entered the United States with the assistance of a professional smuggler. The husband was again apprehended by the INS in 1978 and was again granted permission to return voluntarily to Mexico without the institution of deportation proceedings. He was granted two extensions of time to depart, but failed to leave. The INS then started deportation proceedings against both husband and wife. By that time they had a child who, born in the United States, was a U.S. citizen. At the deportation hearing held in December 1978, respondents conceded deportability, and applied for suspension of deportation under INA § 244(a). See 8 U.S.C. § 1254 (1982 & Supp. 1984) (To be eligible for suspension of deportation, the alien must have been physically present in the United States for seven years, be of good moral character, and demonstrate that deportation would result in extreme hardship to the alien, or the alien's spouse, parent, or child, who is a U.S. citizen or permanent resident.).

The Immigration Judge found them ineligible under § 244(a) because they had not been in the country for the required seven years, and ordered them deported. On appeal to the BIA, they raised a number of arguments challenging the deportation order: that the immigration judge should have given them *Miranda* warnings, that their deportation would be an unlawful *de facto* deportation of their citizen child, and that the husband should have been considered present in the U.S. since his 1972 entry. The BIA rejected the arguments and dismissed the appeal.

In July 1980, the aliens filed a petition for review in the court of appeals, raising substantially the same claims the BIA had rejected. In March 1982, 15 months after the briefs were filed, the court of appeals reversed. *Rios-Pineda v. United States Dept. of Justice*, 673 F.2d 225 (8th Cir. 1982). The court of appeals concluded that the required presence for seven years had accrued during the pendency of the appeals, and directed the BIA to allow respondents 60 days to file a motion to reopen. During the pendency of the appeals, the couple had a second child.

Respondents filed a motion to reopen with the BIA and requested suspension of deportation, alleging that deportation would result in extreme hardship to them and their children. The BIA denied the motion to reopen, holding, among other things, that discretionary relief was unwarranted because the additional facts — continuous physical presence for seven years and an additional child — were available only because respondents had delayed deportation through frivolous appeals. The BIA also held that a favorable exercise of discretion was unwarranted because of respondents' blatant disregard for the immigration laws.

Respondents again filed a petition for review and the court of appeals again reversed and directed the BIA to grant the motion to reopen. *Rios-Pineda v. United States Dept. of Justice*, 720 F.2d 529 (8th Cir. 1983). The Eighth Circuit also held that respondents' prior appeals were not frivolous. See 471 U.S. at 446-48; 62 INTERPRETER RELEASES 468-70 (1985).

dents' issues on appeals were without merit and held that the 7-year requirement satisfied in this manner should not be recognized. In our view, it did not exceed its discretion in doing so.

. . . No substance was found in any of the points raised on appeal, in and of themselves, and we agree with the BIA that they were without merit. The purpose of an appeal is to correct legal errors which occurred at the initial determination of deportability; it is not to permit an indefinite stalling of physical departure in the hope of eventually satisfying legal prerequisites. One illegally present in the United States who wishes to remain already has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible. The Attorney General can, in exercising his discretion, legitimately avoid creating a further incentive for stalling by refusing to reopen suspension proceedings for those who became eligible for such suspension only because of the passage of time while their meritless appeals dragged on.

. . . .

Second, we are sure that the Attorney General did not abuse his discretion in denying reopening based on respondents' flagrant violation of the federal law in entering the United States, as well as respondent husband's willful failure to depart voluntarily after his request to do so was honored by the INS.¹⁴¹

Although in *Rios-Pineda* it was the aliens' appeals to the BIA and the court of appeals that were frivolous, rather than their motions to reopen, it seems likely that the Court would similarly disapprove of frivolous motions to reopen.¹⁴² The good faith approach advocated in this Note, under which aliens are able to delay the filing of petitions for judicial review only when their motions to reopen are nonfrivolous, satisfies these concerns.

2. *The Problem of Frivolous Appeals*

Rios-Pineda, the legislative history of section 106,¹⁴³ and Supreme

141. 471 U.S. at 449-51 (footnote and citations omitted). For a criticism of the Court's discussion of frivolous appeals, see 62 INTERPRETER RELEASES 474 (1985) (noting that "[t]he question whether an appeal is 'frivolous' does not necessarily depend on its success"). See generally Note, *supra* note 136.

In its discussion, the Court emphasized that the Attorney General and INS "confront an onerous task" in administering the immigration laws, "even without the addition of judicially augmented incentives to take meritless appeals . . . and undertake other conduct solely to drag out the deportation process." 471 U.S. at 450-51. For the view that illegal aliens are seen by the Court as "uninvited guests, intruders, trespassers, law breakers," see Aleinikoff, *Good Aliens, Bad Aliens and the Supreme Court*, 9 DEF. ALIEN 46, 47 (1987).

142. In its discussion of dilatory litigation, the Court cited cases in which aliens had filed dilatory or frivolous motions to reopen or reconsider. See *Hibbert v. INS*, 554 F.2d 17 (2d Cir. 1977), cited in *Rios-Pineda*, 471 U.S. at 450; *Sung Ja Oum v. INS*, 613 F.2d 51 (4th Cir. 1980), cited in *Rios-Pineda*, 471 U.S. at 450.

At least one court has applied the rationale of *Rios-Pineda* in a context other than a request for suspension of deportation. See *Torres-Hernandez v. INS*, 812 F.2d 1262, 1264 (9th Cir. 1987) (rationale of *Rios-Pineda* is applicable to the accrual of the seven-year period for discretionary relief from deportation for permanent resident aliens under INA § 212(c)).

143. See Part III.B *supra*.

Court interpretation of the INA¹⁴⁴ all condemn frivolous appeals by aliens. However, both the Third Circuit approach and the Ninth Circuit approach are unsatisfactory ways of dealing with the possibility of frivolous or dilatory tactics on the part of aliens under deportation orders. The good faith approach is the best way to balance the competing concerns of judicial economy and discouraging dilatory tactics by aliens.

a. *The Ninth Circuit's approach.* The Ninth Circuit has primarily argued that its position satisfies congressional intent to limit the number of judicial appeals brought by aliens under deportation orders.¹⁴⁵ However, it has also argued that the bringing of motions to reopen and reconsider is "protected from abuse by the regulations governing section 242(b) proceedings."¹⁴⁶ Under 8 C.F.R. § 3.2, a motion to reopen cannot be granted unless the "evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing"¹⁴⁷ and such a motion cannot be granted to allow an application "for any form of discretionary relief . . . if . . . the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing."¹⁴⁸ Yet these regulations speak only to the conditions for *granting* relief. They do not prevent aliens from bringing frivolous motions that fail to meet the above requirements or any others that are applicable.

It might be argued that these concerns raised by the Ninth Circuit approach are met by the disincentive effect of the possibility that an alien will be deported while waiting for his motion to be adjudicated by the BIA.¹⁴⁹ The regulations provide that "[t]he filing of a motion

144. See Part III.D.1 *supra*.

145. See, e.g., *Yamada v. INS*, 384 F.2d 214, 218 (9th Cir. 1967).

146. *Yamada*, 384 F.2d at 217; see also notes 73-74 *supra* and accompanying text.

147. 8 C.F.R. § 3.2 (1987), discussed in *Yamada*, 384 F.2d at 217; see also 8 C.F.R. § 242.22 (1987).

148. 8 C.F.R. § 3.2 (1987), discussed in *Yamada*, 384 F.2d at 217-18; see also 8 C.F.R. § 242.22 (1987); *Mondragon v. INS*, 625 F.2d 270, 272 n.4 (9th Cir. 1980).

149. 8 C.F.R. § 3.2 (1987) provides that "[a]ny departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion." It would appear that under this regulation an alien's deportation constitutes a constructive withdrawal of a pending motion to reopen or reconsider. See, e.g., *Reid v. INS*, 766 F.2d 113, 116 n.9 (3d Cir. 1985); cf. *Diaz-Salazar v. INS*, 700 F.2d 1156, 1159 (7th Cir.), cert. denied, 462 U.S. 1132 (1983) (had petitioner been deported during pendency of appeal to BIA of denial of motion to reopen, appeal would have been moot). However, at least one court has held that a motion to reopen may be brought after the alien has been deported if the deportation was not "legally executed." *Estrada-Rosales v. INS*, 645 F.2d 819, 821 (9th Cir. 1981); see also note 27 *supra* (discussing the *Mendez* exception); *Martin*, *supra* note 62, at 816-17 & n.57; *Reid*, 766 F.2d at 116 n.9 (suggesting that judicial review of a motion to reopen may be available if the alien's departure from the country before the motion was adjudicated was not voluntary). In addition, the *Reid* court noted the possibility that "in extraordinary cases relief in the nature of a stay might be available in the

to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case."¹⁵⁰ Deportation may proceed unless a stay is granted by the district director, the immigration judge, or the BIA.¹⁵¹ This decreases the incentive to file frivolous motions. However, this factor is at least partially negated by the possibility of judicial review of the immigration judge or BIA's stay denial in United States district court.¹⁵² In any case, it appears that the possibility of being deported while their motion to reopen is pending has not been a sufficient deterrent to prevent many aliens from bringing frivolous or dilatory motions.¹⁵³

b. The Third Circuit's approach. The Third Circuit asserts that its interpretation of section 106(a) is necessary in order to carry out "Congressional intent to prevent successive, piecemeal appeals from being used as a dilatory tactic to postpone the execution of deportation

court of appeals pursuant to the All Writs Act," 766 F.2d at 116 n.9, which empowers federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C. § 1651(a) (1982).

150. 8 C.F.R. § 3.8(a) (1987).

151. *See id.* Aliens have argued that the denial of a stay by the BIA before deciding a motion to reopen or reconsider in effect denies the motion. Several circuits have rejected petitions for review in such situations on the ground that the denial of a stay is not a final deportation order. *See, e.g.,* Reyes v. INS, 571 F.2d 505 (9th Cir. 1978); Reid v. INS, 766 F.2d 113 (3d Cir. 1985); Diaz-Salazar v. INS, 700 F.2d 1156, 1159 (7th Cir.), *cert. denied*, 462 U.S. 1132 (1983). However, one court has declared that "we may treat the Board's unjustified failure to act within a reasonable period as an effective denial of the motion to reopen." *Dabone v. Karn*, 763 F.2d 593, 597 n.2 (3d Cir. 1985), *quoted in* 2 C. GORDON & H. ROSENFELD, *supra* note 9, § 8.9Ab, at 8-91; *cf. Bothyo v. INS*, 783 F.2d 74, 76 (7th Cir. 1986) (distinguishing *Dabone v. Karn* as habeas corpus review of exclusion, finding review precluded because administrative remedies were not exhausted, finding delay was not unreasonable, finding it unnecessary to decide "under what circumstances inaction by the Board may confer jurisdiction upon this Court"). Denial of a stay or inaction on a request for a stay can be challenged in district court. *See* 2 C. GORDON & H. ROSENFELD, *supra* note 9, § 8.9Ab, at 8-90 n.52a; *Dhangu v. INS*, 812 F.2d 455, 459 (9th Cir. 1987).

For a discussion of whether a petition for judicial review may be brought after an alien has been deported, *see* note 36 *supra*. To the extent that an alien risks losing his right to judicial review by being deported, that would provide a further disincentive to the bringing of frivolous motions.

152. *See* 8 C. GORDON & H. ROSENFELD, *supra* note 9, § 62.08[3][b], at 62-34 to -36; *see, e.g.,* Lopez-Alegria v. Ilchert, 632 F. Supp. 932, 935 (N.D. Cal. 1986) (district court has habeas jurisdiction to review district director's denial of stay while motion to reopen is pending); Maldonado de Vasquez v. Ilchert, 614 F. Supp. 538, 539 (N.D. Cal. 1985) (same); *see also* *Dhangu v. INS*, 812 F.2d 455, 459 n.7 (9th Cir. 1987) (citing cases). An unsuccessful district court action could, of course, be followed by an appeal to the court of appeals. *See, e.g., Bothyo v. Moyer*, 772 F.2d 353 (7th Cir. 1985). Even if these appeals were unsuccessful, it is likely that the BIA would have acted on the motion by the time the court of appeals acted on the appeal. *Cf. Matter of Ghalamsiah*, 806 F.2d 68, 70 n.3 (3d Cir. 1986) (INS did not appeal from district court's decision to grant a stay because the BIA was likely to act on the motion to reopen before an appeal could be heard). *But see* *Gallanos* by *Gallanos v. United States*, 785 F.2d 116, 119 (4th Cir. 1986) (appeal of immigration judge's denial of motion to reopen was still pending before the BIA when appeal of district court order was acted on by court of appeals). Needless to say, many aliens will not be in a financial position, or will not think it is worthwhile, to delay their stay in the country through these various maneuvers when their chance of ultimate success in gaining legal status is slim. *See also* note 36 *supra*.

153. *See generally* Note, *supra* note 136.

orders.”¹⁵⁴ It is true that the Third Circuit’s position prevents an alien from delaying more than six months before filing a petition for review of the deportation order. However, by adopting the view that each order should be considered separately, the Third Circuit is sacrificing significant gains in judicial economy that could be achieved by reviewing the orders together. Where an alien’s motion is pursued in good faith, the procedures required by the Third Circuit approach — the filing of two or more petitions followed by two or more rounds of judicial review¹⁵⁵ — seem unnecessarily cumbersome and wasteful of resources.

IV. CONCLUSION

Courts should adopt a “good faith approach” to the section 106 timeliness issue. This approach best balances the competing concerns expressed by Congress in enacting section 106: minimizing the number of judicial reviews received by aliens under deportation orders, discouraging frivolous or dilatory tactics, and ensuring fair procedures for aliens. The good faith approach is also in accord with Supreme Court cases interpreting section 106(a) jurisdiction, in which the Court has repeatedly emphasized that Congress intended to provide a unitary review procedure for issues arising out of deportation proceedings. As the INS urged in *Giova*, “an order declining to reopen the proceedings is . . . intimately and immediately associated with . . . the final order of deportation”¹⁵⁶ and so, where possible, should be treated as an adjunct of the principal order. However, when an alien has abused the administrative process by filing frivolous motions in order to attempt to prolong his stay in the United States, such tactics should not be permitted to delay the six-month time limit on filing a petition for review of the final deportation order.

— Marilyn Mann

154. *Nocon v. INS*, 789 F.2d 1028, 1033 (3d Cir. 1986).

155. For a discussion of a situation in which the Third Circuit approach could lead to consolidated review of the deportation order and denial of the motion, see note 129 *supra*.

156. Brief for Respondent at 18, *Giova v. Rosenberg*, 379 U.S. 18 (1964) (No. 23).